

From the Author

CONSIDERATIONS

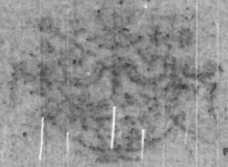
ON

CRIMINAL LAW.

CONSIDERATIONS

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CONSIDERATIONS

ON

CRIMINAL LAW.

By Henry Dugge Esq

*Iustum certe est quod collapsa legis æquitas restauretur, et ut
divine imaginis vebiculum, quod superiores pridem ætates
ob gravissima crimina nequaquam tollerent, levioribus hædie
ex delictis non perderetur.*



LONDON.

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THE HISTORY OF THE

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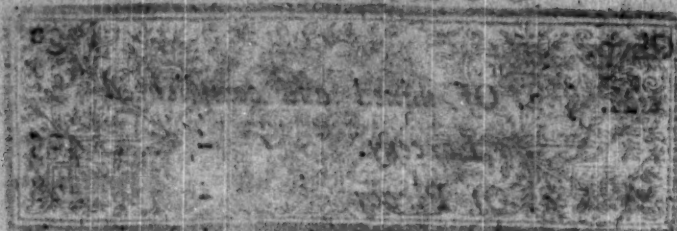
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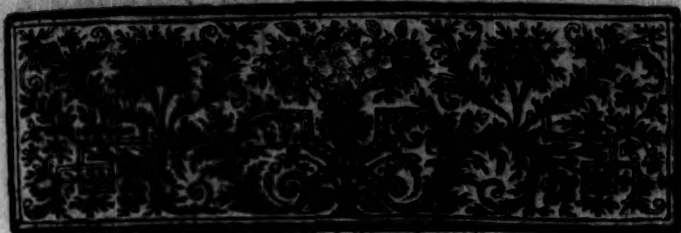
INTRO-



INTRODUCTION

As certainly the
best of superior strength and integrity,
and devotion to the work and mind, against
these apprehensions, and to the same some
distance from his neighborhood. To this day
every man must have been under apper-

While looking however for a
 (perhaps) mentioned among them
 rights and interests; for which they
 become a hindrance, it was (perhaps) not
 any for the sake of support of
 the the same officers should
 indicated means of building



INTRODUCTION.

IN the rude state of nature, when power was thought to confer right, every man must have been under apprehensions from his neighbour. To remove those apprehensions, and to provide some security for the weak and timid, against those of superior strength and intrepidity, was certainly the end of all social confederacies.

While societies, however, were merely federative, mankind retained their rational right of private revenge; but when they became legislative, it was absolutely necessary for the order and support of government, that certain offences should have their stated measure of punishment.

It was requisite, for this purpose, to frame certain established rules, or laws, by which the members of the community were to regulate their conduct with respect to each other, and those rules, or laws, were made with the consent, either tacit or express, of the whole body.

In the infant condition of legislation, the laws by which different states were regulated, were few and simple. Mankind, at first, had more to apprehend from violence than from deceit; and consequently to protect the lives, liberties, and property of the subject from open force, must have been a concern antecedent to the thought of securing him against circumvention.

In the maturer state of society, as mankind grew more polished and refined, artifice took place of force, and evil and designing men studied to accomplish those ends by subtlety, which they were prohibited from attempting by violence.

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As laws multiply with offenses, those of a criminal nature must necessarily have increased with the growing craft and perfidy of men. The same sordid disposition in mankind, likewise, gave birth to that variety of Civil Laws, which have been framed to bind men to the rules of honesty and equity, in the course of their social commerce with each other.

In the forming these laws or rules of action, men had only to consult the dictates of nature, which immediately pointed out to them what was just and what was unjust.

But instead of being directed by that unerring guide, the Light of Nature, (which *Solomon* emphatically calls, *the candle of Almighty God*) many states have framed their systems of government in such a manner, as to induce the necessity of supporting such systems by laws, to which the natural rights of mankind are sacrificed.

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The *Britons*, the *Romans*, the *Saxons*, the *Danes*, and the *Normans*, all contributed in their turns to form our original code of laws. The increase of commerce and riches, and the various revolutions of government, made it expedient, at different periods, that the laws should be varied, modified and improved for the public good. But many of those alterations and intended improvements, especially in our Criminal Laws, were made (as lord *Bacon* expresses it) on the spur of the occasion, and were therefore not sufficiently attended to in their original formation. The obvious disproportion and severity in our Criminal Laws, have long called for the calm and deliberate revifal and confideration of the legislature. The lovers of their country, and friends of human nature, must all wish for fuch alterations in this branch of our laws, as may, confiftent with reason, juftice, and the principles of the constitution, moderate their rigour, and reform the morals of the people by wife regulations, *à priori*; for laws which only take effect *à pofteriori*, and propofe the prevention of crimes, by cutting

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cutting off the delinquent, do not go deep enough for the purpose of reformation; whereas prudent provisions to correct the morals, and proper punishments that counteract the principles of criminality, will have sure and lasting effects. Without such provisions, we may be making perpetual alterations and corrections, but we shall in vain expect any salutary effects; we shall resemble those patients who are always taking physick, but will not alter their bad diet and intemperate modes of living.

The works of human invention are progressive, and are not completed but by degrees. At the last improvement we are apt to sit down satisfied, and vainly imagine that we have accomplished the end we proposed; but time soon unravels the fine-spun system, and we find ourselves obliged to interweave fresh materials to repair the disordered texture.

I am well aware of the supposed difficulties which may attend the discovering

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and suggesting the several amendments, proper or safe, to be made in our Criminal Laws; but if it is allowed, that the reformation of those laws is now become necessary, the importance of the subject will encourage those who have a proper regard for the interest of society to attempt it.

Lord Coke, in his Epilogue to his third Institute, which treats of the Crown Law, after observing, that frequent punishment does not prevent crimes, says, "What a lamentable case it is, that so many Christian men and women should be strangled on that *curfed tree of the gallows*; inſomuch as if in a large field a man might ſee together all the Chriſtians that but in one year, throughout *England*, come to that untimely and ignominious death, if there were any ſpark of grace or charity in him, it would make his heart to bleed for pity and compaſſion!"

His lordſhip then proceeds to ſhew, that the method of preventing crimes is, firſt, by training up youth in the principles of Religion,

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Religion, and habits of industry. Secondly, in the execution of good laws. Thirdly, in the granting pardons very rarely, and upon good reasons. He then concludes, "that the consideration of this prevention, were worthy of the wisdom of parliament, and, in the mean time, expert and wise men to make preparation for the same, *ut benedicat eis dominus*. Blessed shall he be that layeth the first stone of the building, more blessed that proceeds in it, most of all that finisheth it, to the glory of God, and the honour of our king and nation."

The old treatises on our Crown Law, have, in some instances, suggested amendments, but few of them seem to have considered the principle, *that Criminal Laws should not regard punishment so much as prevention*. Several modern writers on our Criminal Laws, have indeed insisted upon the truth of this proposition, without pointing out the means proper to be pursued, in order to apply this principle in reforming our Criminal code.

The Author of *Principles of Penal Law*, hath, however, with great learning and ability, established and explained this and several other leading principles of Penal Law; and having, at the end of his treatise, declared, that he was convinced, a reformation in our Criminal Code, is neither impracticable, unsafe, nor difficult; he subjoins a proposal for that purpose, which cannot be better explained than in the learned Author's own words.

"The *British* constitution is the pride of every *Briton*: to secure, to fortify, to perpetuate that excellent system of government, is the business of every *Briton*. It may be pardonable therefore in me to point out what I conceive to be the best method of accomplishing the reformation in question; leaving the execution of that method, or the adoption of a better plan, to those who lie under the more immediate engagements both of interest and duty."

The learned observer on the ancient statutes, was certainly well founded, in

fug-

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suggesting that a reformation of the *English* law can never be effectually carried on, without the assistance of able lawyers, not members of the legislature. With such assistance it might perhaps be easy to frame separate, declaratory statutes relative to each class of crimes, comprehending all the descriptions and degrees of each crime, with their proportionate punishments. Every such declaratory statute should be attended by a supplemental bill, repealing all prior provisions relative to the class of crimes in that statute contained. It seems superfluous to point out the many collateral good effects which might arise from this method of seeking the end proposed.

The repeal of particular statutes, without such preparatory caution, will be found a mere palliative remedy, which may tend indeed to abate the symptoms of the disease, but from which a radical cure cannot be expected.

Several

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Several Authors of great abilities, who have wrote on the subject of Criminal Laws, agree that the Penal Codes of most nations are very defective; particularly with regard to capital punishments. Among others, the Marquis of *Beccaria*, seems to have considered this subject with great attention,

This humane author has concluded his admirable *Essay on Crimes and Punishments* (which his commentator compares to one of those few remedies, which, in medicine, is capable of alleviating our sufferings) with this position, "That a punishment may not be an act of violence of one, or of many, against a private member of society, it should be public, immediate, and necessary, the least possible in the case given, proportioned to the crime, and determined by the laws."

In his chapter on the punishment of death, after having insisted that this punishment is not authorized by any right, and that it is neither necessary nor useful in any state,

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state, except when the state is in danger, he concludes as follows;

“ I am sensible that the voice of one philosopher is, by much, too weak to be heard amidst the clamours of a multitude, blindly influenced by custom: but there is a small number of sages scattered on the face of the earth, who will echo to me from the bottom of their hearts; and if these truths should happily force their way to the thrones of princes, be it known to them, that they come attended with the secret wishes of all mankind; and tell the sovereign, who deigns them a gracious reception, that his fame shall outshine the glory of conquerors, and that equitable posterity will exalt his peaceful trophies above those of a *Titus*, an *Antoninus*, or a *Trajan*. How happy were mankind, if laws were now to be first formed, now that we see on the thrones of *Europe* benevolent monarchs, friends to the virtues of peace, and to the arts and sciences; fathers of their people; though crowned, yet citizens, &c.”

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The laws made by the sovereign authority, as well in criminal matters as in civil, should certainly be calculated with a view to preserve the lives, liberties, and properties of the subjects. This view is best answered by consulting the happiness of individuals, by providing for their subsistence, and establishing and promoting good habits among them. The most effectual way to ensure the order and harmony of the community, is to establish wholesome moral institutions; for such is the infirmity of human nature, that the wisest men act more from habitude than reflection; how much more powerfully then must this principle operate among the vulgar?

The necessity of laying the foundation of political order in moral rectitude is so strong, that it seems surprising how the idea could arise, that the immorality of an act is not so much to be regarded as its bad tendency to society. Nothing is more certain, than that every immoral act hath such bad tendency; for immorality is the root of all political evil, and an immoral man cannot be a good citizen.

Moral

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Moral habits, however, are not to be enforced by Penal Laws; they are to be inculcated by moderation and good example: but the principal means of making virtue habitual, is to sow the seeds of it in early education.

When we consider how many are totally deprived of the benefit of education, who are nursed and brought up in the midst of poverty, indolence and vice, instead of being surpris'd at the multitude of criminals, we shall rather wonder that their number is not much greater.

The review of our criminal punishments affords a most melancholy prospect to the benevolent mind. The number of criminals, who are deemed to perish like brutes for slight offences, and the frequent instances of innocent persons having been deprived of life in the most ignominious and terrible manner, must sensibly affect all who have any consideration for the safety and welfare of society.

Legislators,

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Legislators, in framing Penal Laws, should not forget, that criminals are their fellow-creatures; that their crimes have been chiefly owing to their unequal lot in society, their want of proper education, and the bad habits they have contracted in their tender years; and that the same unhappy situation might have possibly reduced themselves to the deplorable state of the unhappy criminal.

The following Essay is intended to evince the necessity of moderating the rigour of our Penal Laws, and establishing a more just and equitable proportion between crimes and punishments.

With this view, I have endeavoured to shew, that extreme severity in punishment leads to licentiousness and impunity; that men of mild dispositions, being unwilling to punish severely for slight offences, are averse to prosecutions, and delinquents are suffered to continue in the habit of evil, till, at length, they are guilty of enormous crimes, which might have been prevented by taking proper

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proper cognizance of their first advances to guilt.

With respect to punishments in general, I have likewise endeavoured to shew, that the apprehension of death is not a sufficient motive of terror; that the strongest objects of dread to men of depraved minds, are poverty, labour and confinement; that these evils therefore, which they commit crimes to avoid, should be inflicted on them in proportion to their several degrees of delinquency; and that the example of suffering guilt held up to the criminal, would have much better effect than the terror of immediate death; which, instead of being useful, is in most cases pernicious to society, and ought not to be inflicted but under particular circumstances.

However I may have succeeded in supporting those propositions, I am most firmly persuaded that the establishment of more just and moderate punishments, not only in capital, but in subordinate offences, would be attended with the most salutary effects.

It

INTRODUCTION

It was under this firm persuasion that I have been led, in some parts of the following Essay, to speak in a manner which may perhaps be thought rather too decisive, upon the impropriety of our present Code of Criminal Laws. I have, however, availed myself of the authority of very respectable authors, both ancient and modern, in support of the propositions I mean to establish.

I presumed that it would not be unreasonable at this time to offer some hints on the subject of revising and reforming this branch of our laws; as the House of Commons have already come to some resolutions upon that head.

The present period, indeed, seems, from many concurring circumstances, to encourage this undertaking.

The general character of the age is strongly marked for its benevolence and moderation.

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The sovereign on the throne exhibits a bright example to his people of those and other virtues: May future ages celebrate his reign as the æra when our Penal Laws were moderated, and more equal punishments instituted.

There is, too, a peculiar turn for reformation in the present parliament, who have lately passed two acts, making essential improvements in the law relating to elections and privilege of parliament.

Add to this, that the seats of judicature were never filled with judges more able or more ready to give their assistance to so benevolent an undertaking.

As all are interested in the welfare of their fellow-subjects, all therefore should co-operate in their different departments to effect the salutary purpose of moderating the injustice and rigour of punishments, which deprive society of a citizen, instead of endeavouring to reclaim the guilty and repair the injured; and to
procure

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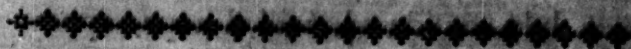
procure such laws to be framed, as may enforce the principles of moral justice and virtue; and, by the prudent correction of slight delinquencies, may prevent the commission of more enormous crimes, and make effectual provision for the peace and good order of society.

As all are interested in the welfare of their fellow-subjects, all therefore should co-operate in their different capacities to effect the salutary purpose of moderating the injustice and rigour of punishment, which deprive society of a citizen, instead of endeavouring to reclaim him, and repair the injury; and to procure

CON



CONSIDERATIONS
ON
CRIMINAL LAW.



BOOK I.

IN order to treat of any subject of science with method and perspicuity, it is necessary to define the meaning of the terms used in that science, with accuracy and precision: it will be proper, therefore, before the Criminal Law is taken under consideration, first to ascertain the meaning of the general term Law.

B CHAP.

2 CONSIDERATIONS *on*

CHAP. I.

Of Law in general.

IT is difficult to form a definition which will give the precise meaning of the term Law, when taken in its most extensive sense. As many definitions which have been given of it, do not seem to be sufficiently just and comprehensive; I shall therefore venture to propose one, which, when duly considered, will, I hope, appear to be full and satisfactory.

Every author, who has wrote on the subject of Law, agrees that the rules prescribed by it are obligatory; and this obligation supposes a lawful power in some superior to punish our omissions and transgressions: Law, therefore, in its general signification, may be defined as follows:

Law is that faculty whereby some lawful superior prescribes rules of action, which
those

CRIMINAL LAW. 3

those in subjection are obliged to perform, under certain penalties, express or implied. And every particular rule of action, prescribed by such power, is a Law; that is, the Law of Nature, the Law of God, the Law of Man, &c.

Hooker, in B. i. p. 6. has this beautiful passage, "Of Law no less can be acknowledged, than that her seat is the bosom of God, her voice the harmony of the World. All things in heaven and earth do her homage; the very least as feeling her care, and the greatest as not exempted from her power."

It follows from the definition of Law, in its general signification, above proposed, that its essential constituents may be reduced to the two following heads: First, power in some lawful superior to prescribe rules; and secondly, obligation on the subjects to observe them. I shall therefore, in order to the further illustration of the foregoing definition, endeavour to explain what is meant by *lawful superior*,

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rior, and afterwards to examine and ascertain the nature of an obligation.

C H A P. II.

Of the Supreme Magistrate.

BY the words *lawful superior*, used in the above definition, is to be understood, with respect to human laws, the supreme magistrate, or sovereign body-politic, whether sole or aggregate; in whom the power of legislation is vested by the consent, either tacit or expressed, personal or representative, of the whole community: For precepts enjoined by an usurper, or one not having lawful authority, are not to be considered as Laws; and are no longer binding, than while the oppressed are compelled by external force to obey them. But Laws imply an internal obligation, as well as external coercion, to enforce obedience.

Whatever

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Whatever any person, in his own private opinion, may think of the expedience of any particular Law, yet, if it be made by lawful authority, he is bound to observe it; for he has given up his right of judgment to the legislature; and conscience dictates to every man, that obedience is due to lawful power.

It may however seem to follow, from the foregoing definition of Law, that the supreme magistrate is not himself bound by the laws of the land: For as he acknowledges no superior, no one can command him; since such a power would induce the absurdity of *Imperium in Imperio*.

Upon this subtlety the advocates for tyranny and arbitrary government have strongly insisted; and from hence Hobbes, and others, have concluded, that to the sovereign power belongs impunity.

This proposition, however, is far from being true, in the extent which they would

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ascribe to it. In all states whatever, the good of the governed is the real, or pretended object of government. Even despotism, which scarce deserves the name of government, does not disavow this principle; and when the arbitrary Will of Eastern tyrants is stretched to a degree of oppression which their subjects can no longer bear, we find that, slaves as they are, they have the spirit to remove the tyrant, though they have not the sense to rescue themselves from tyranny.

But in states which are ruled by Laws, this principle does, or ought to give life to every spring of government; and the supreme magistrate is bound to make those laws the measure of his administration. He is held to the observance of them by the strictest moral obligation, or in other words, by the Law of Nature. And more firmly to bind his conscience to the due discharge of his duty, the policy of most states has required him to make a solemn promise on oath, that he will govern according to the laws in being.

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It is true that, in one sense, impunity belongs to the sovereign power; that is, there is no legal jurisdiction to which the sovereign is amenable to answer for any infraction of the laws. To suppose such a jurisdiction, is to conceive a power above the sovereign power; which is to imagine an absurdity. Besides, as there is no stated penalty for breaches of sovereign duty, they must be punished by a law *ex post facto*, which would be against reason and justice; and would place the supreme magistrate in a worse condition than that of his meanest subject.

It must therefore be confessed, that the sovereign power is not liable to punishment *eo nomine*; and every violence offered to the supreme magistrate, by individuals, in order to avenge his violation of the laws, is not a punishment, but an act of hostility.

Nevertheless, though the sovereign power is not liable to punishment *eo nomine*, yet nothing can be inferred from hence, to

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support the principles of non-resistance, or to prove that the supreme magistrate may act arbitrarily, and make free with the lives, liberties, or properties of the subject. To form such an inference, would be to take the word Impunity in so unlimited a sense, as would in fact be destructive of the very end of society.

But it is not for an ignorant and factious multitude, misguided perhaps by a few needy and interested leaders, to determine what is, or is not, a violation of the laws, in either prince or people.

The common and statute law can only determine in cases where subjects resist the supreme magistrate; and the united voice of the whole people can only decide upon the crisis when resistance may be justifiable.

The revolution was founded upon the principle, that protection and subjection are reciprocal, *protectio trahit subjectionem*. And the prince having, in the unanimous
opinion

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opinion of the whole nation, withdrawn his protection, and violated his trust; the people had a right to, and did actually resume the sovereignty, and conferred it on another; under such regulations and restrictions, as appeared to be most conducive to their welfare and security.

CHAP. III.

Of Obligations.

AN obligation is a moral quality, by which we are bound to do or suffer something; and by the subtlety of philosophers and lawyers, it has been resolved into various species. Some have divided obligations into *natural* or *innate*, and *contracted* or *covenanted*; into *internal* and *external*, *perfect* and *imperfect*.

Innate obligations are defined to be, those of which the reason is derived immediately from the nature and essence of man; such as the obligations men are under to preserve

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serve their existence.——*Contracted* obligations are defined to be, those which are not derived from nature or from any natural obligation; but which exist in consequence of some particular act. Such is the obligation to educate children, which presupposes the act of generation.

An *internal* obligation is defined to be, that which is dictated by conscience: An *external* one, that which is founded on some right established in society.

An *imperfect* obligation is said to be, that which is derived from those reciprocal duties, by which men are bound to relieve each other's wants: A *perfect* obligation is said to arise from some actual promise or contract, by which one person binds himself to another, and gives that other a right of compelling him to fulfil his engagement.

But, in truth, the two last divisions may be resolved into the first; for *internal* and *external*, *perfect* and *imperfect*, are but different

different words to express the distinction between *innate* and *contracted*.

The same may be said with respect to other distinctions which have been made, such as *universal* and *singular*, *absolute* and *conditional*, *natural* and *civil*, *moral* and *political*, &c. They are only different ways of denoting one and the same distinction; and may all be resolved into *innate* and *contracted*.

In fact however, these nice subtleties and refinements are more curious than useful; nay, they are rather of prejudice in the investigation of truth, and contribute more to create perplexities, than to disentangle them. Even the division into *innate* and *contracted*, will perhaps, on closer examination, appear to be a distinction merely nominal.

We can easily conceive, that there are particular obligations which are not born with us; because the circumstances under which alone they can be fulfilled, do not
exist

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exist at the time of our birth. Thus, as no human being is born a father, consequently the paternal duties cannot immediately take place: but to argue from thence that they are not natural, or of the essence of human nature, is a sophistical abstraction. As well might we say, in opposition to these philosophers, that the obligation men are under to preserve their existence is not natural, or innate; because no human being is born a man, or has, at the time of his birth, an immediate capacity of procuring or selecting food for his sustenance.

There is, in truth, strictly speaking, no such thing as an innate obligation. We are indeed born with a faculty of discerning our duty, under the several circumstances and relations in which choice or accident may place us; and whenever those particular circumstances and relations exist, whether they proceed from any act, promise, or contract relative to others, or arise from the particular frame or constitution of human nature, respecting ourselves only, the

the obligation they bring with them is equally natural.

When a human being, for instance, has attained a degree of knowledge sufficient to discover by what means his existence is to be preserved, he is under an obligation of employing those means for the purpose of self-preservation. In like manner, when his faculties are so far matured, that he is able to discern the relative duties of a child, a friend, &c. he is under an obligation of pursuing the means conducive to the discharge of those duties.

The obligation, in these cases, is equally natural. All the difference seems to be, that the sense of the obligations we lie under, with respect to ourselves, is antecedent to that by which we discover our obligations with regard to others.

The same reasoning may be applied to the other distinctions; for *internal* and *external*, *moral* and *political*, *perfect* and *imperfect* obligations, are all equally natural.

It

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It is as consentaneous to reason, and as essential to human nature, consequently as natural, to discharge what is called an external, political, or perfect obligation, as to fulfil an internal, moral, or imperfect one. They who tell us, that, by the latter, we bind ourselves by our own act, and give others a right of compelling us to fulfil our engagements, seem to lose sight of the true nature of an obligation.

There is a material difference between obligation and compulsion. When any one is subject to an external, political, or perfect obligation, he is bound to fulfil it; not because he has given another a right to compel him to the performance of it, but because reason or conscience tells him that it is his duty to discharge the engagements he has entered into, unless they are of a nature repugnant to some primitive or more powerful obligations. If a man, for instance, should rashly covenant to do an act, the doing of which must inevitably draw ruin upon himself, or upon some third person, he is not bound to fulfil it; because

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because it is contrary to the first and essential duties of human nature.

It is reason or conscience therefore which is the only criterion that determines our obligations. If we argue that external force has any influence in the determination, then we make the nature of an obligation to depend on physical instead of moral causes: but wherever compulsion begins, obligation ceases; and thus all the nice distinctions above alluded to will appear to be vain and nugatory. In short, the more we subtilize and deviate from reason and plain sense, the more uncertain we render the duties of human nature, and by that means weaken the obligations of moral virtue, which is the surest foundation of our obedience to human laws.

A proper application of these principles will tend to expose that false logic which has in a great measure made the observance of law an obligation distinct from, and independent of, morality.

But

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But as all human laws are, or ought to be, founded on the *Law of Nature*, it will be necessary to enter into a particular consideration of that law. Previous to this examination, however, it will be proper to say something of a *State of Nature*; which will be better understood if we first enquire into the *Origin of Man*.

CHAP. IV.

Of the Origin of Man.

IN treating of the origin of man, the conjectures and descriptions of some of the pagan writers, and the moderns who have followed them, are to be wholly rejected. It is not reasonable to suppose, that the human race sprung out of the ground like reptiles, and peopled the earth at once, or that they were engendered, according to the fabulous account of the poet, from the dragon's teeth sown by Cadmus.

Neither

to conclude that at the beginning one male

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them from the brute creation; and gave them pre-eminence over all sublunary beings.

We are warranted by divine authority to conclude, that at the beginning one male and one female only were created; from whom the human race derive their existence. This sacred assurance gives us room likewise to believe, that the first pair came from the hands of the Great Creator complete and adult; that is, that from the first moment of their existence, they were endued with all the powers of body and faculties of mind, which their descendants are not capable of attaining, but by a tedious progression of improvement.

Did not the sacred writings lead us to such a conclusion, yet the light of reason plainly indicates, that our first parents must have been formed with corporeal and intellectual faculties, in a state of maturity.

Had they come into the world in the helpless state of infancy, they would neither

ther have had strength to procure aliment, nor judgment to have made a proper selection of it.

If we do not suppose their faculties to have been mature, from the moment of their Creation, we cannot, on *natural* principles, account for their preservation. Ignorant of the nature of every thing about them, they must have been hourly exposed to various dangers; and could not be secure of their existence even for a moment.

Were we to admit the Pagan hypothesis, and suppose the earth to have been peopled at once with numbers; yet they must have laboured under the same disadvantages as a single pair. Utter strangers to every object of their view, all equally unexperienced, they could afford no mutual aid or assistance to each other; and the human race must have been presently extinct, unless we suppose them to have been endowed with powers equal to those which we acquire by experience and example: and

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when we consider the regular progression, and the chain of dependence visible throughout the works of nature, it is not possible for us to imagine that numbers were created in such a state of maturity; all strangers to, and independent of each other.

But the sacred authority having rendered vain all conjectures of this kind, we are justified in concluding, that mankind owes its origin to the junction of one male and one female; and this being established, we shall proceed with more ease and certainty in our enquiry concerning a *State of Nature*.

CHAP. V.

Of a State of Nature.

IT being admitted that one pair gave existence to the human species, it follows, that a State of Nature, such as some philosophers have described, must be merely hypothetical. As *Puffendorf* very

6 justly

justly observes, an absolute State of Nature could never have existed; such a state could be only relative; that is, while some lived together in a social or civil state among themselves, yet, with respect to others, they retained their natural liberty; and consequently remained in a State of Nature.

With regard to our first parents, the wife, by reason of the imbecillity of her sex, was in subjection to her husband; and the children were necessarily under parental authority. Dominion therefore was in the man; who was the common head or superior. Therefore, the first family cannot, properly speaking, be said to have lived in a State of Nature, though their posterity were necessarily reduced to such a state.

When the common head of the first family was lost, and their issue separated and formed distinct families, *then* the State of Nature properly began; because the heads of each family were independent of

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each other, and acknowledged no common superior.

Now, as the establishment of a common superior, or in other words, of a supreme magistrate, must have been with an intent to remedy the evils resulting from such an independent state, it will be no improper digression briefly to consider a question which has been much debated among philosophers; that is, whether such a state of nature is a state of war or peace; for we can never have a just idea of the propriety of civil laws, without a previous examination of that state which they were instituted to improve.

It is well known that the celebrated philosopher of *Malmsbury*, has concluded the State of Nature to be a state of war. This conclusion has been contraverted by many, but with the greatest precision by *Puffendorf*. He observes, that *Hobbes* argues *ex hypothesi*, supposing all men to have existed together at one and the same time in a State of Nature: which supposition cannot

cannot be admitted, unless we allow the earth to have been stocked at once with a multitude.

Puffendorf adds further, that they are rather to be supposed to have originally had amicable than hostile dispositions towards each other. He argues moreover, that the causes assigned by *Hobbes*, which render men offensive to each other, such as pride and vanity, which provoke to contempt and hatred, are of a particular nature; consequently not of sufficient influence to make all mankind hostile to each other, but only to set individuals at variance: and, upon the whole, he concludes, that man's natural state is that of peace.

In this opinion he seems to be countenanced by *Grotius*, who wrote before him; and who observes, that men may live pacifically in a State of Nature, provided they exist in a degree of extreme simplicity; or dwell together in mutual bonds of distinguished charity. The first kind of

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communion, he observes, is conspicuous in some parts of *America*; where they lived, for ages together, in a State of Nature without any inconvenience; and the primitive Christians, he tells us, with some few who lead a monastick life, are remarkable instances of the latter.

The great *Montesquieu* has likewise expressly opposed the opinion of *Hobbes*; he argues that man, in a State of Nature, would first of all think of the preservation of his existence; that he would immediately be sensible of his weak condition, and that his *Timidity* would be excessive; and in support of these reflections, he cites the example of the savage youth who was taken in the woods of *Hanover*.

With respect to *Montesquieu*, it may be objected, that his reasoning is founded upon the supposition of such an absolute State of Nature, as cannot be allowed to have ever existed. Were we however to admit such a state, yet the argument will be found to be partial and incon-

inconclusive; for the nature of mankind is not to be determined from the example of an individual.

The dispositions of men are as various as their persons; and their conduct will be regulated by their dispositions. The *timid* will fly from the *bold*. The *bold* will pursue the *timid*. The *fierce* will be in a state of enmity with each other; the *mild* will associate in friendly concord.

By nature men have neither an inclination or an aversion to each other merely as men. Their affection or dislike is in consequence of their connections, or of the qualities they suppose to exist in each other *.

With regard to *Grotius*, the instances he produces only tend to shew, that where the grounds of dissention are few or none,

* *Natura homines hominibus neque addicti, neque infesti sunt. Facta cujusque aut connexu societatem, aut diversitate inimicitiam provocantia, alios nobis caros, alios exosos faciunt.*

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men may live pacifically in a State of Nature; but as the causes of disunion expand and increase, the hostile disposition of mankind unfolds itself and augments.

Though we should admit, therefore, that men *may* live pacifically in such a state of uncommon simplicity, as reduces the possessions of men to their real wants, and limits their desires to that standard; yet we must not from thence conclude, in general, that a State of Nature is a State of Peace.

Besides, such a simple and innocent state, is in truth imaginary; and even among the savage *Americans*, where it is supposed chiefly to subsist, it is well known, that the merest trifles are sufficient to provoke hostilities.

As the modes of refinement take place, occasions of disagreement will multiply in proportion. Men of selfish and turbulent dispositions will be prompted by ambition or by avarice, or both, to invade and injure others of mild and social natures,
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and of larger possessions; and thus a state of hostility will necessarily commence.

With respect to religious orders of men, they cannot properly be said to live in a State of Nature; neither are these communities considerable enough to illustrate this question. Add to this, that *Grotius* has not given any precise definition of a State of Nature: and we may even venture to say, that the *Americans*, of whom he speaks, do not exist in such a state.

As to the arguments of *Puffendorf*, it may be objected, that in determining whether in a State of Nature men are most inclined to war or to peace, he considers only the *general* nature of mankind, which decides little with respect to the merits of the question. For, admitting the greater part of mankind to be social and pacific, yet it will not therefore follow, that a State of Nature is not rather a state of war than of peace. The selfish passions of a few would not, it is true, involve the whole species, *simul ac semel*, in a state of war; but

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but these selfish affections will operate so fatally, that all, in their turns, will feel their direful effects; and the most mild and pacific will, *vicissim*, be involved in hostilities, even in their own defence.

That the seeds of contention are inherent in our nature, seems undeniable; consequently, as occasions of disagreement increase, hostilities will multiply. It must be confessed, at the same time, that pride, envy, and other offensive qualities, are of a particular nature, and are not such as provoke the generality of mankind to acts of violence; since there are many dispositions which can endure such circumstances of provocation, without suffering their passions to be inflamed to any dangerous degree.

But *Puffendorf* argues farther, that we are not to consider the natural state of a man, as that of an animal swayed by the sole impulse of sensation; but as of a creature endowed with reason, which is the noblest part of his composition, and which governs

governs all his faculties.—It is by no means just, he observes, to exclude the use of reason ; but we ought rather to allow its joint operation with the other faculties, in order to discover with precision the natural state of man. As the advantage of peace, says he, to which reason persuades us, is evident, man must naturally be of a pacific nature ; especially when he finds, that wherever he departs from reason and follows his passions, the event turns to his disadvantage. From whence, he adds, we may conclude, that the natural state of man, considered as abstracted from civil society, is not *war* but *peace* ; which dictates to every one, not to injure another who has given him no offence, but to permit every one to enjoy their property, to observe mutual covenants, and willingly to advance each other's benefit, which they are under the strictest obligations to promote. For since the natural state of man implies the use of reason, we cannot, neither ought we, to exclude that obligation which reason enjoins : and as every man may perceive
from

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from his own experience, that it is his interest rather to be benevolent than adverse to his fellow-creatures, he may presume, from the similitude of their nature, that others entertain the same sentiments; therefore, he concludes, it is wrong, in describing such a state, to suppose that men neglect the dictates of reason, which nature has constituted the supreme guide over their conduct: and therefore, that is improperly called a natural state, which produces the neglect or abuse of that principle, which is above all others most natural.

But the truth of these propositions may be admitted in their fullest extent, and yet the inference will be inconclusive as to the point in question. What renders it thus inconclusive, is the ambiguous use of the words '*naturalis status*', or natural state. If by the natural state of man, we are to understand the natural frame, disposition, aptitude, or tendency of mankind, it must be allowed, that men in general, considered

as beings compounded of reason as well as passion, will, in such natural state, be rather inclined to peace than to war: and *Hobbes* himself admits as much, where he says, that "Reason, which he calls the Law of Nature, declares unto us the ways of peace, where the same may be obtained; and of defence, where it may not."

But if, by the natural state of man, we understand that state in which men exist while they retain their natural liberty, and acknowledge no common superior; this acceptance of the words, which is the only just one in the present dispute, will lead us to a different conclusion; for it is difficult to conceive how such a state can be a state of peace.

Admitting men in general to be pacifically inclined, yet the few who, neglecting the guidance of reason, pursue the impulse of their passions, would, as has been observed, necessarily involve the rest in hostilities *vicissim*; for reason would dictate

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to them the ways of defence; and even the most rational are not always under the guidance of that divine principle.

It may be granted, that they who neglect the guidance of reason may, in one sense, be said to depart from their natural state; since it is agreeable to the nature of man to be governed by reason. But men, considered as retaining their natural liberty, and owning no common superior, are in that sense to be deemed in a State of Nature.

We ought therefore to guard against the inaccuracy of confounding together these distinct meanings; and we ought carefully and clearly to distinguish when, by a *natural state*, we mean such a state as is most consentaneous to the nature of man abstractedly; and when we speak of a *natural state*, or a State of Nature, as in contradistinction to a social or civil state.

Such a state, if taken in the latter sense, appears to be rather a state of war than of peace,

peace, and though, as before observed, the members of such a state may not continually, or *simul ac semel*, exercise hostilities, yet frequently, and *vicissim*, they must be at enmity.

The seeds of contention are deeply rooted in those depraved minds which are governed by appetite instead of reason; and their depravity will create subjects of contention, which must be decided by force, where there is no common superior to determine between the contending parties. We may add, that was a State of Nature a state of peace, there would have been no occasion for the institution of civil societies.

Paffendorf is however justifiable in his objections against *Hobbes*; whose hypothesis is erroneous, and of dangerous tendency. For it is evident that *Hobbes* uses the word Nature in its general sense, as expressive of the disposition and frame of human kind; and from this erroneous proposition, that a State of Nature is a

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state

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state of war, he, and others who have followed him, contend, That by nature, men have a right to every thing;—that they may do every thing which seems good to themselves without regard to others;—that every one is to be considered as an enemy, who is neither a subject or confederate in political society; with such like destructive principles.

Happily, however, this baneful doctrine carries its own antidote with it, by involving its author in endless contradictions and absurdities. For if *war*, as *Hobbes* defines it, is *the desire of contending by force*; and if *Nature*, as he affirms, *declares unto us the ways of PEACE, where the same may be had, and of DEFENCE where it may not*, then Nature wills contrary things, and his argument is resolved into an absurdity.

Besides, if Nature declares the ways of *peace*, where the same may be had, and of *defence*, where it may not; then Nature never declares unto us the ways of *offence*,
and

and consequently a state of war is not natural.

Again, if Nature declares unto us the ways of peace, then it must declare unto us the ways requisite to that end; consequently moderation, justice, humanity, with all the social and pacific virtues, are natural; and rapine, injustice, and hostility, are unnatural.

Thus it is evident from the very arguments used by *Hobbes* himself, that, considering the word *Nature* as expressive of the disposition, natural frame, or tendency of human kind, the natural state of man, as an animal compounded of reason and appetite, is not a state of war.

But as the most rational do not always obey the dictates of reason, when appetite presents some immediate good, and as such irregular appetites are not checked and restrained by force, occasions of hostility must be frequent, which are best prevented by civil institutions.

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The most perfect civil state, however, may, in some degree, be deemed a state of war; as there will be frequent contests, by force, among individuals:—and as a State of Nature is not a state of war, *omnium in omnes*, neither is a state of civil society a state of peace, *omnium in omnes*. All that we can conclude is, that the hostile state is most prevalent in a State of Nature, and the pacific one in civil society.

We find that *Nations* who, with respect each other, may be said to exist in a State of Nature, as they acknowledge no common superior, live in a state of war; that is, though they are not continually, or *simul ac semel*, in a state of hostility, yet frequently, and *vicissim*, they are at war.

Therefore, though we allow the nature of mankind in general to be pacific, yet a State of Nature seems to be rather a state of war than peace. For wherever there is no common tribunal to which the contending parties may appeal and submit their differences, there the decision must be by force;

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force; and such a state may be more properly termed a state of war, in which every one retains his private right of redress and revenge.

A State of Nature therefore may be regarded in two lights; either, first, as that state which is most consentaneous to the nature of man, considered as an animal compounded of reason and passion; or, secondly, as a state contradistinguished from the social or civil state. Confining it however to the latter acceptation, it remains to enquire into the Law of such a state; that is, the *Law of Nature*.

C H A P. VI.

Of the Law of Nature.

LAW, in the *genus*, having been defined to be "that faculty whereby
"some lawful superior prescribes rules of
"action, which those in subjection to him
"are obliged to observe, under certain
"penalties,

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“penalties, express or implied;”—and every particular rule so prescribed, being a law, or Law in the species, it may be thought that the Law of Nature is not included within the foregoing definition, and consequently that it is improperly so called.

Hobbes says, “As Law (to speak properly) is a command; and these dictates, as they proceed from Nature, are not commands; they are not therefore called Laws in respect of Nature, but in respect of the Author of Nature, Almighty God.”

This explanation, given by *Hobbes*, even though he argues against the existence of the Law of Nature, will assist us in shewing that the Law of Nature is properly comprehended within the above definition. Every intelligent being, when he reasons about points of duty, must be sensible that he derives the faculty by which he reasons from some superior; and the principle which we call *conscience*, would

would have no room to operate, if men did not conclude themselves to be under the inspection of some superior intelligence, to whom they are accountable for their actions, and who will punish their transgressions.

Now, every rule of conduct suggested by reason is a command: For, as every one must be persuaded, that his reason is a faculty bestowed upon him by some superior being, he must conclude that what is suggested to him by the medium of reason, is the will of that superior being from whom he derives that faculty. And the will of every lawful superior, signified immediately or mediately, is to those in subjection to him a command, or *Law*; which they are under an *obligation* to observe. Consequently, the dictates of nature are properly termed Laws.

The material difference between natural and human laws is, that in the latter the penalty of transgression is expressed, and follows immediately upon conviction; whereas in the former it is implied, and

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the time when it will be exacted uncertain, and in the womb of futurity. The former likewise bind us only by a pure, or, as it is called, an internal obligation; whereas the latter are farther enforced by external compulsion.

But Law being a command, with a power of coercion in some superior, and no visible power appearing to enforce the Law of Nature, many of the Pagan writers, and some moderns, have supposed, that there is no such thing as the Law of Nature; but that self-interest in such a state is the only standard of right and wrong,

Horace says, that *utilitas*, which may be translated *self-interest*, is commonly the parent of right and wrong, or of justice and equity:

Ipsa utilitas justæ prope mater & equi.

And he afterwards says, that Laws were invented to guard against injustice; for that by Nature we cannot distinguish between just and unjust.

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The annotator on this passage observes, that Nature indeed directs us to what is good, useful, and agreeable to us; that on the other hand, she points out what is bad and prejudicial to us, but that she does not in the same manner point out what is just and unjust.

In support of these propositions, *Desprez*, the annotator, cites the authority of St. Paul in his epistle to the Romans, chap. v. verse 13, "For until the Law, sin was in the world; but sin is not imputed where there is no Law." And again, chap. vii. verse 7. "I had not known sin but by the Law; for I had not known lust, except the Law had said, Thou shalt not covet."

Hobbes likewise has quoted this passage from St. Paul, to shew that it is the Law which creates honesty, and dishonesty, justice and injustice.

As this pernicious doctrine is thus sheltered under sacred authority, it becomes necessary

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necessary to attempt an explanation of these words of the Apostle, and to consider how far they will warrant the conclusion drawn from them.

St. Paul says, "*That till the Law,*" that is from the time of Adam till the days of Moses, "*sin was in the world.*" But he adds, "*sin is not imputed where there is no Law,*" that is, those particular sins will not be imputed which are specified in the Law of Moses, and not comprehended within that *universal Law*, which God revealed to every man when he endowed him with reason.—That Law, which, to use the words of Lord Coke, "God, at the time of the creation of man, infused into his heart, for his preservation and direction; which is *lex eterna*, the eternal Law, the moral Law, called also the Law of Nature.—And by this Law, says he, written with the finger of God in the heart of man, were the people of God a long time governed, before that Law was written by Moses, who was the first writer of Law in the world."

"world." Calvin's Case, Co. Rep. part 7.

The meaning of St. Paul however appears more clear from his own words, which follow.—"I had not known sin," says the Apostle, "but by the Law," which he thus illustrates: "For," he adds, "I had not known lust, except the Law had said, Thou shalt not covet;"—that is, without the Law of the Decalogue, I should never have acquired that excellent and refined sense of moral duty, which shews the various modes of concupiscence included in that Law to be unlawful.

But to refute the unnatural and dangerous construction which *Hobbes*, *Desprez*, and others, have put on the words of the Apostle, and to support the comment on the foregoing passages, we need only refer to the words of the same Apostle in his epistle to the Romans, chap. ii. verses 12, 13, 14, 15. "For, as many as have sinned without Law, shall also perish without Law: and as many as have sinned under the Law, shall be judged by the Law."

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“ sinned in the Law, shall be judged by
“ the Law. For not the hearers of the
“ Law are just before God, but the doers
“ of the Law shall be justified. For when
“ the Gentiles, which have not the Law,
“ do by nature the things contained in the
“ Law, these having not the Law, are a
“ Law unto themselves: Which shew the
“ work of the Law written in their hearts;
“ their conscience also bearing witness,
“ and their thoughts the mean while
“ accusing, or else excusing one ano-
“ ther.”

Here it is evident that St. Paul makes a distinction between the Law Divine of Moses, and the Law of Nature: and he anticipates the objection of the Gentiles, who might have pleaded the want of the Law of Moses, in excuse for their iniquity; for he tells them, that they have by nature a Law written in their hearts, and that their conscience bears witness to their conduct.

Nothing therefore can be drawn from the words of St. Paul to prove, that man
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in a State of Nature has no sense or discernment of what is just and unjust. The contrary conclusion is manifestly deducible from the words of the Apostle. From him we learn, that reason, which is the noblest part of the human composition, plainly indicates the difference between justice and injustice;—that it teaches us, that to do justice makes for our lasting advantage, and that though there were no Law in being to punish instances of injustice, yet they carry with them their own punishment in their consequences.

It will be to no purpose to object the example of nations which have lived by rapine, and practised many barbarous customs repugnant to the precepts of Nature. The depravity of such as are impelled by passion and appetite, will counteract and obliterate the most clear and obvious impressions of Nature; and every day's experience shews us, that this depravity impells men to neglect the divine precepts, though enforced and illustrated by the most solemn revelation.

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But if it should be said, that men cannot by the Law of Nature distinguish right from wrong, and just from unjust; by what lights, it may be asked, did they who were not enlightened by the ray of the divine Law, frame the several systems of civil Laws, in which the boundaries between just and unjust are so accurately ascertained? What taught the civil codes to speak the language of justice? From whence were those principles derived which compose the Law of the Twelve Tables?

The very framing of civil Laws proves an antecedent faculty in Nature of distinguishing right from wrong, just from unjust: and it seems a strange piece of sophistry to say, that civil Laws create the distinction, when those very Laws are created by the faculty which makes the distinction.

Some philosophers, however, and among others *Carneades*, contend, that the diversity of these civil Laws is an argument that there

there is no such thing as the Law of Nature. Men, say they, have adapted laws to their convenience, and to their different manners. These laws they vary as circumstances alter, and therefore there is no Law of Nature. All men, and other animals, are led by nature to pursue their own interest, therefore there is no such thing as justice; or if there is, it is a folly to practise it, since we must necessarily prejudice ourselves by consulting the benefit of others.

But what is the amount of these objections? They only prove that the ambition and irregular appetites of bad men have framed several partial and iniquitous systems of government, which must be supported by various unequal and pernicious institutions. Nevertheless, though designing rulers and legislators, influenced by the principles of corrupted reason, have endeavoured to accommodate their systems to their own narrow and mistaken notions, yet it does not therefore follow, that there is not a Law of Nature which presents
more

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more enlarged views, and shews it to be the true interest of every individual, to consult the good of the whole, by the practice of justice and of every moral virtue.

There are in fact reciprocal obligations in a State of Nature, as well as in a civil state; and certain common rules of action, which direct men to the discharge of those obligations. The only difference between the two states is, that the latter is armed with a civil power to compel men to the observance of those duties which subsist in the former. By the latter men acquire a political capacity, by which the several members are united in one body; and by their union, are better sheltered and defended against the fraud and violence of the cruel and rapacious. But their political capacity does neither enlarge nor abridge the moral duties which they owed to each other in their natural capacities. Before they were citizens, they were men. The relations between parent and child, brother and brother, friend and friend, were antecedent to political connections. Parental fond-

ness,

ness, filial duty, fraternal love, social amity, were affections co-eval with human nature; and the reciprocal duties resulting from them, were obligatory, before the existence of any particular Law, either divine or human; since they are dictated by that universal Law, which the Great Creator imparted to every rational being.

The principles of this Law, which are discovered by the light of reason, may, by the indulgence of depraved habits, be effaced in individuals, but can never be obliterated in the whole species. In times of the darkest ignorance and the most corrupt manners, this light will beam in some part of the human frame.

The precepts of the Law of Nature are clear to every common understanding, where the mind is not previously tainted with corrupt prejudices. The reciprocal duties of consanguinity, the mutual obligations of universal justice and benevolence, are obvious to every unprejudiced and intelligent being.

To render these obligations more powerful, it is evidently every man's interest to be just. Even according to *Epicurus*, who argued against the Law of Nature, and resolved every thing into pleasure and utility, Justice is the only standard by which we can measure self-interest. *Cicero's* Offices prove at large, that nothing is useful but what is just. The man, says he, who reasons, that "*this is just, but that is expedient,*" erroneously dares to separate what Nature has cemented; which is the source of fraud and all iniquity. *

And we are told by *Cicero*, that *Socrates* used to denounce execrations on those whose opinion first divided what Nature had so closely united †.

Nothing is more certain than that injustice carries with it its own punishment,

* Sic enim cogitans—Est isthuc quidem bonum, verum hoc expedit, res a natura copulatas audebit errore divellere: qui fons est fraudum, maleficiorum, scelerum omnium. Cic. de Off.

† Socratem solitum execrari eos, qui primum hæc natura coherentia, opinione distraxissent. Idem ibid.

not

not only in the perturbation of mind arising from past reflection, but in the dread of future apprehensions. The unjust, in a State of Nature, must be sensible, that the greatest subtlety of mind and strength of body will not long secure them against the vengeance of the injured. From whence this conclusion naturally results, that to enjoy peace within, and security from without, which Nature prompts every man to desire, it is our interest not to offend or injure each other.

It is no argument, as has been said, against the Law of Nature, that many nations seem to have lived without any sense of the obligations it enjoins. For it is difficult, if not impossible, to bring the example of any nation, of which the inhabitants have existed, *simul ac semel*, in a State of Nature. All have had some civil Laws or customs by which they have regulated their simple and savage polity: and when a state is corrupted by the Laws, the mischief, as *Montesquieu* observes, is

E 2 almost

almost incurable; because the evil lies in the remedy itself.

When by the power, influence, or imposition of some leading members, erroneous and iniquitous institutions are once established, and it is made the immediate and apparent interest of subordinate tyrants to support such a corrupt system, error and iniquity become sacred. The prejudice of education fetters the multitude to that degree, as to render them tenacious of habits and customs to which their own natural rights are sacrificed; and the few who have discernment sufficient to discover the folly, iniquity, and oppression of such a system, dare not even whisper their discoveries. The dread of power awes them from the free exercise of their reason. They are obliged to bend their understanding beneath the yoke of slavery, and live the unwilling victims of a savage or absurd polity; unless some extraordinary circumstances concur to make a reformation practicable.

These

These principles will account for the long continuance of *Eastern* despotism; and for the many absurd and execrable systems of religion which have been invented in aid of tyranny, and in derogation of the natural rights of mankind. Such systems, which have been founded on usurpation or imposition, are fostered by ignorance, and supported by power. The principles of fear and of slavish subjection are early inculcated, and the people are industriously deprived of every advantage, which, by enlarging their ideas, might dispel the darkness in which they are enveloped, and admit the rays of reason, which is the Light of Nature, to shine upon them.

There is indeed no kind of pretence for arguing against the essence and obligations of the Law of Nature, from instances of the non-observance or abuse of it by individuals, or even nations. As well might we argue against the being and excellence of civil Laws, from the frequent abuse and violations of them. Nay, we might even deny the truth and perfection

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of the Divine Law, from the many examples of the impious infractions and abuses of its sacred injunctions.

It is evident that the most pious and salutary institutions may be perverted by abuse, and turned to the prejudice of those whom they were intended to benefit. What blood has been shed in the cause of religion, occasioned by disputes, arising from the different interpretations of God's holy word! No wonder, then, if the Law of Nature, which subsisted before the Divine Law was promulgated, was subject to abuse; and no wonder, if in those parts of the world, where the truth of the Divine Law has not extended its sacred influence, men still live under the dominion of prejudice and superstition.

Not only the writers above-mentioned, but many others, have unaccountably argued against the existence of the Law of Nature. *Puffendorf*, *Selden*, and others, who may in this point be deemed followers of *Epicurus* and *Carneades*, have contended against it; but the

the amount of all their objections (not to multiply quotations) may be comprized in the words of *Puffendorf*; who says, that no actions are in themselves obligatory or unlawful, until they are made so by some Law *.

The opinion of *St. Augustine*, however, is very different; and we should conclude with him, "That actions are not unlawful because they are forbidden, but that they are forbidden because they are unlawful."

Law does not, as *Puffendorf* and the rest suppose, "create the Rule of Right," but is itself framed by that Rule; unless by Law they here intended that general Law which includes the Law of Nature; but as they appear to speak of positive Laws only, we may venture to pronounce the proposition ill-founded. No positive Law can be the Rule of Right to *Man, as such*. Positive Laws rule *the Citizen*, the Laws of

* Nullos actus in se esse debitos aut illicitos, antequam per legem talia fiunt.

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Nature govern *the Man*. As positive Laws are various in different ages and countries, consequently there must be Rules of Right contrary to each other, which it is absurd to suppose; for there can be but one Rule of Right, *nec erit alia lex Romæ*, says Cicero, *alia Athenis: Alia nunc, alia post-hac: sed & omnes gentes, & omni tempore, una lex & sempiterna & immortalis continebit.*

Positive Laws are no more than particular applications of the Rule of Right, or Law of Nature. If there was no other Rule of Right than what was created by civil Laws, there would be no such thing as immorality; and if a delinquent could evade punishment in this world, he would, upon this principle, have nothing to fear in the next.

Besides, positive Laws cannot create the Rule of Right, since that Rule enjoins many virtues which cannot be comprized within the narrow code of human Laws; and which existed before the promulgation of

of any Law, except the Law of Nature, Human, or positive Laws, restrain us *from doing injury to others*, but they cannot, in many instances, compel us *to do benefits to others*. They cannot enforce the duties of gratitude, benevolence, and compassion; which may be violated so secretly as to elude the human cognizance.

Some modern philosophers have argued against the Law of Nature, upon a principle somewhat more enlarged than that of the followers of *Epicurus* and *Carneades*. Among others, *Helvetius*, and that most acute and ingenious sceptic Mr. *Hume*, have made public utility the rule of right, and the motive to every species of virtue. But do they not mistake an effect for a cause? Is not public utility rather a consequence of virtuous actions, than the motive which determines agents in general?

That philosophers do often direct their conduct with a view to public good, is admitted: but nevertheless it is certain, that even they must have practised many moral
and

and social virtues before they had an idea of that end. -And it is equally certain, that many pursue the dictates of Nature, who have not a capacity to entertain such enlarged notions as those of public good.— What is the primary principle of the *στοργή*? What impels parents and relations to be fond of their children and kindred, and to prefer them to others more worthy of general affection? What impels children to acts of friendship, benevolence, and tenderness, before their reason is ripe enough to have an idea of public utility? There is certainly a kind of natural impulse, by which some dispositions are determined to the practice of virtue, without any reasoning *à priori*: and however some affect to despise this virtue, and to call it in derision Constitutional, it is nevertheless useful and amiable.

This impulse, or whatever it be called, is to the mind what appetite is to the body. For though, when we consider the nature of the human frame, we may draw most powerful arguments from reason, to prove that

that aliment is necessary for the preservation of our existence; yet the wisdom of Providence has not left us to the direction of reason alone in these circumstances, but has ordained stated returns of appetite, which prompt us to seek the requisite nourishment for the support of Nature,

In like manner, though we may, by the help of reason, discover the obligation to moral duties, yet God has not thought proper to leave us altogether to such guidance, but has implanted in us a sense of these primitive principles, these *Kovai 'Envoiai*; by which we are impelled, without reasoning, to the discharge of those duties; and when we break them, conscience never fails to reproach us with the violation, and to torment us with remorse.

The *exercise of the faculty of reason*, however, is not without its use: for there are many dispositions naturally well inclined, but when they arrive to that state of maturity in which the passions grow strong, and the objects of desire multiply, then appetite gradually corrupts, and often effaces

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effaces those primitive principles, unless the reasoning faculty comes in aid to their support. But however it may humble us in our opinion of our own importance, we must not impute too much to reasoning *a priori*, which is as dangerous as to attribute too little.

That we are not wholly governed either by sentiment or reason, is admitted by Mr. Hume: therefore, if virtue, as he confesses, arises partly from sentiment, that is, from feeling, how can public utility, which is a matter of pure speculation, be assigned as a general motive?

It is certain that the primary causes of human actions are often inscrutable: all that we know is, that whatever they are, they are to be referred to the Author of our being; but by what springs he moves this microcosm, we can no more say, than we can tell why he has been pleased to form animals of the same species with such various dispositions.—In some, *sentiment* seems to be the first motive; in others, *rea-*
son:

CRIMINAL LAW. 61

son: nay, these opposite principles appear to actuate the same persons alternately at different times; so that nothing general can be concluded with respect to first causes. But the inquisitive spirit of man delights in metaphysical subtleties, and rather than confess himself to be bewildered in speculation, he chuses to entangle others in perplexities.

From what has been said, it may be collected, that man has from nature a sense of primitive duties, and that Civil Laws were only made to carry those duties into execution, and to restrain those appetites which oppose their exertion. Civil Laws therefore cannot alter or abrogate the Laws of Nature: neither prince, parliament, or people, have power over them *.

* *Est quidem vera lex, recta ratio, naturæ congruens, diffusa in omnes, constans, sempiterna, quæ vocat ad officium jubendo, vetando, & à fraude deterreat. Huic legi neque abrogari fas est, nec derogari ex hac aliquid licet, neque tota abrogari potest. Neque vero aut per senatum aut per populum hac lege possumus. Nec est quærendus explanator, aut interpret ejus alius.*

Grotius,

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Grotius, in his *Prolegomena*, speaks so highly of the Law of Nature, that, after enumerating the various duties it inculcates, he adds, That they would be obligatory, although we should grant (which, he says, cannot be admitted without the highest impiety) that there is no Supreme Being, or that he does not superintend over human affairs †.

In this principle, however, *Grotius* is opposed by *Puffendorf*, who calls it an impious and absurd hypothesis. It is indeed absurd to suppose, that the Laws of Nature would be obligatory, were there no Supreme Being; since, on that supposition, there could be no such thing as Nature, of which God is the Author.

But in attempting to refute this strange hypothesis by argument, *Puffendorf* has himself fallen into an inaccuracy. He

† Hæc quidem, quæ jam diximus, locum aliquem haberent, etiam si daremus, quod sine summo scelere dari nequit, non esse Deum, aut non curari ab eo negotia humana. Grot. de Jur. Bell. & Pac.

argues,

argues, that "these dictates of reason can
 "in no sense have the force of a Law; as
 "Law necessarily supposes the power of a
 "superior *."

Now, in truth, every dictate of reason must be a Law; since reason is the gift of the Supreme Being, and appears in a greater or less degree, according to the different powers of application, and opportunities of improvement, which one man enjoys above another.

Whether our reason is of the essence and nature with that of the Divinity, or of a distinct nature, is a metaphysical subtlety, which it is quite needless to inquire into. It is sufficient, whatever its nature be, that it is a faculty which distinguishes us from all sublunary beings: and when we wander too far into the regions of metaphysics, we return fraught with nothing but doubts and absurdities.

* *Ista tamen rationis dictata tunc nullo modo possint habere vim legis, quæ necessario superiorem ponit.*

Puff. de Jure Nat. & Gent.

Every

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Every rational creature must nevertheless be fully sensible, that his reason is the gift of some superior Being; and this reason, which is the medium through which he perceives his duty, must make him sensible of the power of that Superior, and tell him that a penalty is annexed to the breach of that duty: for a rational being, conscious of moral obligation, cannot but suppose that the *giver* is greater than the *gifted*, and that the violation of such moral obligation will not be attended with impunity.

That moral sensation which we call *conscience*, and which, according to the learned *Selden*, is nothing but the obligation of Nature, would oblige him to the discharge of his duty, and deter him from the breach of it by the dread of the unknown penalty*.

* Ob eo nempe violata ad quorum observationem, ex obligatione, quam ita vocabant, naturali qualifcunque ea fuerit, seu, ut Christiani dicimus, ex nexu conscientiae, seu conscientiae foro, ei qui violarat, proprio esset adstrictus. Seld. de Jur. Nat. & Gent.

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The power of this principle is proved by the remorse which attends the violation of moral duties; and it is only by a long habitude of evil that men overcome such compunctions.

The dictates of Nature therefore being obligatory, and every obligation necessarily presupposing the existence of some superior, who has power to punish our transgressions, we may, from these principles, perhaps be led to a definition of the Law of Nature.

Grotius defines it to be the dictate of right reason, pointing out the moral turpitude or moral necessity of any action, from its agreement or disagreement with the nature of a rational being, and consequently shewing such action to be either enjoined or prohibited by *God*, the Author of Nature *.

Hobbes

• Jus naturale est dictamen rectæ rationis indicans actui alicui, ex ejus convenientia aut inconvenientia cum ipsa natura rationali; inesse moralem turpitudinem,

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Hobbes says, there can be no other law than reason; and the same definition in effect is given by *Plato*, *Cicero*, and other ancients; and likewise by the author of *Doctor and Student*, *Finch*, and others more modern.

Puffendorf makes several objections to these definitions. To that of *Grotius*, he objects, That it still remains obscure what those actions are which are in themselves unlawful, and by what tokens they may be distinguished from others.—And again, That no actions are in themselves obligatory, or unlawful, until they are made so by some law *.

To that of *Hobbes*, he objects, That reason, properly speaking, is not the Law

nem, aut necessitatem moralem, ac consequenter ab Auctore Naturæ Deo, talem actum aut vetari aut præcipi. Grot. de Jur. Bell. & Pac.

* In obscuro manet, quinam sunt illi actus in se illiciti, & quo judicio ab aliis actibus liquide internoscantur. Nullos actus ob se esse debitos aut illicitos antequam per legem tales fiant. Puff. de Jur. Nat. & Gent.

of

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of Nature, but the medium by which, if rightly applied, that law may be discovered*.

According to the definition which *Puffendorf* has given, the Law of Nature is that which is so agreeable to the rational and social nature of man, that without it mankind cannot subsist in honest and peaceful society†.

This definition, however, seems rather to describe the effect, than to explain the essence of the law in question. Nevertheless, it may be of use in ascertaining the meaning of that law.

In order properly to define this law, we ought undoubtedly to recur to the nature

* *Neque enim ratio proprie loquendo est ipsa lex naturæ, sed medium quo rite usurpato illa cognoscatur.*
Puff. de Jur. Nat. & Gent.

† *Illæ est quæ cum rationall & simili natura hominibus ita congruit, ut humano genere honesta & pacifica societas citra eandem constare nequeat.*

Puff. de Jur. Nat. & Gent.

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of mankind. Man, by nature, has an aptitude and disposition to society; and reason instructs him, that those actions are lawful and obligatory, which are conducive to that end; and those unlawful, which have a contrary tendency.

Reason likewise informs him, that a conduct opposite to the social end of his being must be repugnant to the will or command of that Superior, from whom he derives his existence; and that certain punishment must attend every such transgression.— Therefore it may be said, that *the Law of Nature is that faculty, which dictates those moral duties which every intelligent being is obliged to observe, under the unknown penalty of transgressing the will of that Superior, from whom he derives such his rational faculty.*

The meaning of the Law of Nature, and the obligation it enjoins, being ascertained, we shall with greater ease pursue our inquiry, and examine what are the Rights of Nature.

C H A P. VIII.

Of the Rights of Nature.

BEFORE we attempt to explain the Rights of Nature, it will be proper to ascertain what is meant by the word *Right*.

Grotius defines it to be “a moral quality belonging to a person, intitling him justly to do, or to have something *.”

But the definition of *Puffendorf* seems to be more full and precise. He says, “It is most frequently taken for that moral quality by which we exercise lawful dominion over persons, or lawfully retain subjects of property, or by virtue of which something is due to us †.”

* Qualitas moralis personæ competens ad aliquid juste habendum vel agendum. Grot. de Jur. Bell. & Pac.

† Frequentissimum est ut accipiat pro qualitate illa morale, qua recte vel personis imperamus, vel res tenemus, aut cujus vi aliquid nobis debetur.

Puff. de Jur. Nat. & Gent.

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In another place, *Puffendorf* defines Right to be "the liberty which every one has of using his natural faculties agree-
"able to right reason *."

Rights, therefore, may be considered, either as they respect a man's person, or his property,

And from the foregoing definitions, it may be concluded, that with respect to a man's person, it is by nature free, so long as he makes a rational use of his faculties. So long therefore no one ought to restrain his liberty, or do him any bodily harm; much less ought any one to attempt his life.

From hence it follows, that he may lawfully defend his person against any violence or injury; and if he cannot otherwise protect himself, he may slay the aggressor: for reason directs every man to exert his natural faculties, in order to repel force by force. This right is amply exemplified

* *Libertas quam quisque habet facultatibus naturalibus utendi secundum rectam rationem.*

and most elegantly described by *Cicero*, in his oration for *Milo*.

A man too has not only a right to repel present acts of violence, but to prevent such acts, and to take security against future attempts to his prejudice: for no man who has just cause to suspect that an injury is meditated against him, is obliged to wait and postpone the means of defence till the danger approaches.

When, however, he has provided for his present safety, and obtained reasonable security against future injuries, the Law of Nature, as *Hobbes* very justly observes, commands him to pardon. That law directs men to be merciful, and ordains that no revenge be taken on consideration solely of the offence past; that is to say, the Law of Nature enjoins, that after reparation obtained, all revenge ought to tend towards the amendment of the person offending, or of others by the example of his fate: for revenge, when it only considers the offence past, is nothing but triumph and vain-glory, and is directed to no end.

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With respect to property in a state of nature, while all subjects lie open and in common, a right accrues to the first occupant. The use of this universal right, says *Grotius*, supplied the place of property; and whatever any one had taken possession of, another could not take from him without doing him injustice *.

This Right of Nature is well illustrated by *Cicero*, *de Finibus*. "As in a theatre," says he, "which is in common, the place which every man occupies, may be said to belong to him; so, if we suppose a city, or the world, to lie in common, yet that does not invalidate the right which every man has to his acquisitions †."

* Talis usus universalis erat tum vice proprietatis, nam quod quisque sic arripuerat, id ei arripere alter nisi per injuriam non poterat.

Grot. de Jur. Bell. ac Pac.

† Quomodo theatrum cum commune sit, recte tamen dici potest ejus cum locum, quem quisque occupavit: sic in urbe mundove communi non adversatur jus quo minus suum quidque cujusque est.

Again,

Again, *Cicero*, in his first book of his *Offices*, says, "In a State of Nature there is no private property, but it becomes such by ancient occupancy of subjects which were once in common, or by conquest, by operation of Law, by covenant, condition, or lot *."

Occupancy, therefore, in a State of Nature, being the only means by which subjects of property, which lie open, can be acquired and made private; and such occupancy being an act of the body, not of the mind, it may be proper to consider, whether upon the vacancy of the subject, or the death of the first occupant, the right of the next claimant must likewise commence by occupancy only.

To state this question in a clearer light, it may be enquired, whether, in a State of Nature, property is derivative,—or in other words, whether children have a

* *Sunt autem privata nulla naturâ, sed aut veteri occupatione, aut qui quondam in vacua venerunt, aut victoriâ, aut lege, pactione, conditione, sorte.*

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right to patrimonial possessions after the death of the parent, where the father makes no declaration of his mind, that they should not succeed to his property.

It is admitted by those who argue against derivative rights, that a father, apprehending his end, may, in a State of Nature, make a conditional gift, or what the civilians call a *donatio mortis causa*.

However this inquiry may at first sight appear foreign to the subject of Criminal Laws, yet it will be proper to examine it with particular attention, as the reasoning in the ensuing sheets, with respect to forfeitures in Criminal Cases, will depend altogether on the determination of this question.

SECT.

S E C T. II.

Of the derivative Rights of Children.

SOME, whose judgment deserves to be highly respected, have argued, that, in a State of Nature, on the death of the first occupant, the subject reverts to the common stock, and consequently lies open to the claim of the next occupant.

But this argument seems to consider Man in a State of Nature, as a creature governed altogether by appetite, without any rational sense of right and wrong. But considering Man as a compound of reason, as well as of passion, the very nature of his composition will afford an answer to the argument; for men, even in a State of Nature, will, by the light of reason, perceive and acknowledge the rights which children derive from their parents,

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parents, though the sanction of civil Laws is necessary to protect those rights, and transmit them in a course of peaceable succession,

It has been argued, however, that, in a State of Nature, the end of property is subsistence; that we cannot assume more than we can use, nor hold it longer than we live, and are capable of using it.— That no alteration arises from circumstances of improvement, but that it is enough that the thing improved becomes more advantageous to ourselves.

To this it may be objected, that such an absolute State of Nature is here presumed, as in truth never existed. Men are here considered in such a deplorable state, as the Poet figures them when he describes them fighting *propter glandem & cucurbitula*.

But even admitting such a state, yet when we say, “ that the end of property

“ is

is subsistence—that we cannot therein “assume more than we can use,” do not we argue inconclusively? For where shall we draw the line and determine the quantum of this subsistence? What will be a copious sustenance for one man, will be a scanty provision for another, who perhaps requires and can use a double portion.

To take up *Cicero's* illustration, as in a theatre which lies in common, though one man of extraordinary bulk may require as much room as two, yet he has as good a right to the place he occupies, as another who covers but half that space. So, in such a State of Nature, wherein all things are common, a man who can use a double portion of subsistence, has as good a right to his share, as another who can use but half the quantity has to his moiety.

Every man's natural rights are as extensive as his wants. Therefore, the end of property, when confined to mere subsistence, can have no rule; for no one can determine

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determine how much another can use; and if every man is allowed to judge for himself, he may assume whatever he pleases, under pretence of necessity.

But, in truth, the very terms of the foregoing propositions admit, while they seem to deny, that there is a degree of property in a State of Nature, beyond what is necessary for subsistence.

By subsistence is here to be understood, that provision which is absolutely requisite for the support of life; without respect to conveniences which render it agreeable.

When it is said, therefore, "that we cannot assume more than we can use, nor hold *it* longer than we live, and that it is enough that the *thing improved* becomes more advantageous to ourselves," it may be asked, what do the relative pronoun, *it*, and the words *thing improved*, refer to? Certainly to some other subjects

subjects of property than what are requisite for a bare subsistence; for a thing improved, is something more than a subject absolutely necessary for subsistence; since the word *improvement* implies, that it was sufficient for that purpose before, but that, by such improvement, it is made still more advantageous to us. Consequently, as it is not contended, but that the improver himself may retain the thing improved, it must be confessed, that the end of property is more than subsistence.

In fact, however, there seems to be no foundation for contraverting, that every man, even in an absolute or hypothetical State of Nature, has a right to retain as many vacant subjects as he can acquire. *Grotius* says, that every man might seize as much as he could to his own use †. And he adds, as before cited, that what he had so taken possession of, no one could take from him without doing him injustice.

† Quisque hominum ad suos usus arripere posset quod vellet. Grot. de Jur. Bell. & Pac.

Man,

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Man, in a State of Nature, has not only a right to retain his acquisitions, but to transfer them; and if he dies in possession, derivative rights accrue to his children, where he makes no declaration to the contrary. The modes indeed in which the succession descends, are of positive and civil institution; but the right of succession is a right of Nature.

It may here be added, that, in strictness, perhaps, children, as such, can never be considered as in a State of Nature. Whatever they may be with respect to others, yet in relation to their parents, they are connected in a social state, supported by reciprocal duties and obligations. The father is the head of the family; he protects them by his power, and nourishes them by his affection; consequently, in return for those benefits, they owe to him obedience and subjection.

When the parent is no longer in being, to discharge the tender offices which Nature enjoins, reason proclaims aloud, that
his

his children should succeed to his property, that they may thereby be in a capacity of providing for themselves; or in case of infancy, that it should devolve in trust for their benefit.

It may however be objected, that the children may have been separated from their parent, and at the time of his death, may be in a capacity of providing subsistence for themselves, and consequently can have no right of succession to their parent's property.

This objection, however, will depend in a great measure on the force of that proposition which confines the end of property to subsistence.

Admitting however that children may have obtained a separate provision, yet it has been shewn, that every one may retain as many vacant subjects as he can acquire; and that no one can, without doing him injustice, deprive him of his acquisitions. As others therefore are under an obligation

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not

not to disturb his possession, which is the foundation of a right in him; † when his right ceases by his death, who has so good a title of succession to his vacant property as his child, who is his natural representative?

If the father has a right, on apprehension of death, to make a donation in favour of the child, certainly when he dies without making any declaration of his will, the presumption of natural affection which all men are bound to favour, gives a title in the child, preferable to all others; for where the father is silent, he is supposed, as *Grotius* observes, to have intended that which is most just and equitable *.

This derivative right has been acknowledged in all ages, and in all countries; *Grotius* and *Puffendorf* have written largely to prove it to be a right of Nature; and

† L'obligation precede le droit : avant que de concevoir aucun droit, il faut toujours supposer quelque obligation sans l'existence de laquelle il n'y auroit point de droit. *Principes du Droit Naturel.*

* Creditur id voluisse quod æquissimum atque honestissimum est.

Puf-

Puffendorf cites many authorities, both sacred and profane, to shew that both by the dictates of reason, and the consent of all nations, children have a preferable title to the property of an intestate.

St. *Paul* in his second epistle to the *Corinthians*, chap. xii. verse 14. says, "For the children ought not to lay up for the parents, but the parents for the children."

No one sure will venture to deny, but that where children have not forfeited their claim, by the habitual wickedness of their dispositions, parents are under an obligation of transmitting to them the succession to their property; and, as has been intimated before, an obligation from one to another, creates a *right* in him to whom the obligation is due.

The Ancients, who looked into the system of Nature, paid such deference to this right, that they did not suffer parents to bequeath their property to the prejudice of their children.

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Plato considers the goods of the parent not as his own, but his family's; and till the time of *Solon*, no one could dispose of his estate by will, in prejudice of his children. *Tacitus* in his account of the ancient *Germans* says, That every one's heirs and successors were his children; and no one had a right to make a will †.

Isæus says, 'The Law gives the possessions of the father to the child, and does not suffer him who has legitimate children, to make a will.' And again, he says, It is not lawful for any one to bequeath or transfer his property, without the consent of his children, if he leaves legitimate ones behind him at his death.

This, we see, is carrying the rights of children to a very great extent; and this naturally leads to the consideration of a question which has been much debated among the learned; that is, *whether the*

† *Hæredes successoresque sui cuique liberi, et nullum testamentum.*

right of making a will, is a right of Nature? And the discussion of this point will, it is presumed, place the natural right over property, in a very full and conspicuous light.

It may be proper to premise, that the word *Will*, is here used in an enlarged sense, as denoting an instrument, by which all kinds of property, whether real or personal, may be transmitted.

S E C T. III.

Whether the Right of making a Will, is a Right of Nature?

WITH respect to this question, *Grotius* is of opinion, that though a Will, like other instruments, may operate under various forms prescribed by Civil Laws; yet the substance of it is derived from the general dominion over property, and consequently is of *Natural Right*. I can, he observes, alienate my property, not only absolutely, but conditionally, not only irrevocably, but with power of revocation; and yet, in the meantime, retain the possession, and the full right of occupation *.

* Quamquam enim testamentum, ut actus alii, formam certam accipere possit jure civili, ipsa tamen ejus substantia cognata est dominio, et eo dato, *juris naturalis*. Possum enim rem meam alienare non pure modo, sed & sub conditione, nec tantum irrevocabiliter, sed et revocabiliter, atque etiam retenta interiore possessione, & plenissimo fruendi jure.

Grot. de Jur. Bell. ac Pac.

Puf.

Puffendorf expresses his doubt, whether this opinion of *Gratius* is well founded. As those subjects of property, says he, over which dominion is introduced, are of use to the living, and as human affairs no longer concern the dead, therefore it does not seem necessary that such dominion should include a faculty of disposing of our property after our deaths. But it is sufficient if every one exercises dominion over his property while he lives, without a power of extending it beyond his life †.

Puffendorf then proceeds to shew, that those claiming the testator's estate and effects, may refuse or neglect to execute their Will: For which reason, he observes, the Ancients bound their survivors by an oath to fulfil their Wills; being conscious

† Nam cum res illæ, quarum dominium est introductum vivis hominibus inserviunt, ad mortuos autem res humanæ nihil amplius attineant. Igitur non ita necessarium videbatur, ut dominium in se contineret facultatem disponendi quid circa res alicujus post mortem debet fieri. Sed sufficere poterat, si quis suæ potestati res subjectas haberet, quousque viveret, nec eam ultra vitam extendere possit.

Puff. de Jure Nat. & Gent.

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that no human tie was obligatory. And after citing many instances of the violation of Testamentary Wills, by the survivors of the deceased, he concludes, that it is vain to make dispositions concerning property, which the disposer cannot protect, and which his survivor, who might, will not †.

Nevertheless, these objections made by *Puffendorf*, do not, upon examination, appear to be well grounded. It should be remembered, that the question is about a *Right*, not about the means or power of carrying that right into effect. The right may subsist, though the person in whom it is inherent, has not the power of exercising that right, and of directing its incidents and consequences agreeable to his intention.

The proposition of *Puffendorf*, which affirms, that it is sufficient for every one

† Citra hoc vana erat dispositio, quod tueri auctor non posset, reliqui qui poterant, nollent.

Puff. de Jur. Nat. & Gent.

to exercise dominion over his property while he lives, is not well founded.

If men lived only for themselves, this proposition might indeed be granted. But it may be asked, Why should not the dominion over his property be as extensive, as the affections of his mind are enlarged? As his affections and wishes extend to the care of posterity, why should not his power over his property be coextensive for their benefit? Such principles are surely most natural.

It is to no purpose to argue, that it is vain to make dispositions concerning property, which the disposer cannot protect, and which his survivors who might, will not: for his inability, and their disinclination to carry the will into execution, only prove, that in a State of Nature there is no method of compelling men to do what in conscience ought to be done. But this does not at all invalidate the opinion of *Grotius*, that the right of making a will is a Right of Nature.

Besides,

Besides, *Puffendorf* allows that such dispositions are not repugnant to the Law of Nature, but he doubts whether they necessarily result from the nature of dominion over property*.

But *Puffendorf* admits, however, that there is nothing which prohibits one from transferring his property to another, at the same time reserving a particular right to himself while he lives †. But he proceeds and says,—The question is not so much about such dispositions, as concerning wills by which a proprietor disposes of his property, and at the same time retains the liberty of altering his will to the last moment, so that the right of the heir does not

* *Nemo facile adseruerit juri naturæ repugnare, ut quis possit de suis rebus disponere, eo tempore quo dominus est, et effectum conferre in tempus quo futurus dominus non sit; ita ut hoc ex dominii natura necessaria aliqua ratione resultet, haud quidquam adparet.*

Puff. de Jur. Nat. & Gent.

† *Nihil prohibet quo minus quis dominium rei suæ in alium possit transferre, recepto tamen sibi certo in eam rem jure quoad in vivis fuerit.* *Idem.*

commence

commence till after the death of the testator †.

Now, it must be confessed, that this difference is so extremely nice, that it seems difficult to conceive any reasonable ground for the distinction. The foundation of it, however, seems to rest on the exception which *Puffendorf* makes to the definition of a testament given by *Grotius*, which the latter considers as a species of alienation. — Considered as such, it must be allowed, that a transfer to another, with a reservation of a particular right, is more strictly a mode of alienation. But if we consider a testament as *Puffendorf*, after the *Roman* lawyers, chuses to define it, to be nothing more than a declaration of our will with regard to the succession to our estate, which we may at any time at our pleasure alter and revoke, so as to make their right com-

† Non tam de hujusmodi ultimis dispositionibus quaestio est, quam de illis testamentis, quibus quis ita de suis rebus disponit, ut libertatem tamen ea mutandi ad ultimum spiritum retineat, utque hæredi demum a morte testatoris jus in ipsius bona incipiat nasci.

Puff. de Jur. Nat. & Gent.

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mence after our death *; considering a testament in this sense, I say, there seems to be no reason why a proprietor may not make a disposition to take effect after his death, with power of revocation, as well as make a transfer to take effect in his lifetime, with power of reservation. The one, though not so strictly a mode of alienation, is as natural and necessary a consequence of the dominion over property as the other; for, in a State of Nature, all means are necessary which promote the end dictated by reason.

Though the testamentary right, however, be a Right of Nature, yet it has been a question, whether it may be extended so far as to justify the disinheriting of children. Most writers, however, have agreed that children may be disinherited, and their conclusion seems to be grounded on reason.

* *Declarationem voluntatis nostræ circa successores in bona nostra post mortem nostram; quæ tamen ante mortem pro libitu nostro sit mutabilis & revocabilis, et ex qua aliis demum ab excessu nostro jus nascatur,*
Puff, de Jur. Nat. & Gent.

If

If a child discards all duty to a parent, and proves enormously and habitually abandoned, flagitious, and unnatural, he may justly be disinherited. His expectations of succeeding to his father's property arise altogether from the reciprocal obligations and duties between parent and child; and if he breaks asunder the bonds of nature, it is just reason that he should forfeit the benefits resulting from these tender ties. *Grotius*, however, is of opinion, that a disinherited child is intitled to aliment, unless he has deserved death. Upon which *Puffendorf* observes, That he can scarce conceive how a son can deserve disinheritance or death, who is in such a period of life as to have a claim of aliment from his parents *.

By this objection, however, *Puffendorf* seems to confine the word *alimenta* to subsistence due to such only as are in an infant state, which surely *Grotius* could never in-

* *Et si vix videam qua ratione exheredationem aut mortem mereri queat filius, in tali ætate constitutus in qua ipsi a parente naturaliter alimenta debeantur.*

tend,

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tend, for he uses the word *alimenta* as applicable to something due to parents likewise.

His meaning seems to be, that though parents may disinherit their children, yet they ought to leave them sufficient for subsistence. And this opinion seems to be well founded; for, though of ripe years, they may, from various contingencies, be incapable of providing for themselves.

Now no bad behaviour whatever can forfeit their title to mere subsistence. They did not bring themselves into the world, and they who were the immediate cause of their existence, are bound to furnish the means of supporting that existence, till by the act of God, or of the law, it is extinguished.

Their existence alone, therefore, is a sufficient title to aliment, but they have no derivative claim to the conveniencies and ornaments in life, but in consequence of their merit. The first is due as a right; the latter

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ter are claimed as rewards; and their merit is presumed, where the parent at his death makes no declaration to their prejudice.

To recapitulate what has been said, it is submitted, that, upon the whole, it may be fairly inferred, That man, in a State of Nature, has the liberty of using his natural faculties conformable to right reason:—That while he makes such use of them, his person ought to remain free:—That no one has a right to restrain his liberty, much less to do him any bodily harm, or to attempt his life:—That in case of any injury or violence meditated or offered against him, he has a right to prevent the mischief intended, and to use force in order to obtain reasonable security:—But that nevertheless, when he has provided for his present safety, and secured himself against future injuries, he ought to pardon the offender; for that he has no right to prosecute revenge in consideration solely of the offence past, but for the purpose only of the present reparation, and of future security.

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And with respect to property, it may be concluded, That man, in a State of Nature, has a right to as many vacant subjects as he can acquire:—That he may alien and transfer his acquisitions in his lifetime:—That he may dispose of them by will, to take effect after his death, even to the disherison of his children:—And that, where he makes no declaration of his will, his children have a derivative right to his possessions, from the presumption of his affection.

Since, therefore, these rights with respect to person and property belong to man in a State of Nature, it follows, that every abuse of those rights, in regard to ourselves, and every deprivation, invasion, or interruption of them, in regard to others, is a crime in the more extensive sense, or, in other words, an offence against the Law of Nature, which might be lawfully punished. It remains therefore to consider by whom, and how far such punishment might be inflicted,

SECT. IV.

*Of the Right of Private Revenge,
and its Effects.*

IN a State of Nature, offences of which the effects terminated in the offender only, without any immediate consequences with respect to others, were little regarded; and as they provoked no resentment, they were subject to no punishment. At this time the idea of public good, and of the mischiefs arising from bad example, were notions too refined to take place; and it was not till after the establishment of civil society that such considerations acquired any influence.

Offences, however, which immediately affected others, did not pass unrevengeed in a State of Nature. As the learned and judicious Author of the Historical Law Tracts has observed, "No passion is more keen
 H " theless,

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“ theless, when kept within due bounds,
“ is authorised by conscience.”

But as, in a State of Nature, the bounds of revenge are only limited by the disposition of the person injured; consequently, in such a state, the measure of revenge must be various and uncertain.

Men of irritable and vindictive natures will express greater resentment on account of some slight injury, than others of more gentle and forgiving tempers will shew in consequence of the most grievous wrong. Even a look of contempt will incense one man, more than the foulest words of contumely will provoke another.

In a State of Nature, wherein every one is his own avenger, this contrariety in the dispositions of mankind must have been attended with various inconveniencies. Grievous oppressions must have escaped with impunity, while slight injuries were immoderately revenged.

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In such a state, however, occasions of disagreement could be but few. These occasions have increased with the refinements of civil society, which, by multiplying the objects of ambition and avarice, have enlarged the desires of mankind, and given a larger scope for the unnatural affections to operate.

We may nevertheless conclude, that, even in a State of Nature, the selfish principles militated against the dictates of reason. As mankind were always endowed with the same natural faculties, each in various degree, and as appetite was always an ingredient in their composition, the greater part, no doubt, would seek the gratification of their present desires, without regard to the interest of others, or of their own future benefit.

C H A P. VIII.

Of the first probable Causes of Con-
tention.

IF we search deep for the root of these unnatural affections, we shall probably find them coexistent with the first association, or, to use a less exceptionable term, the first intercourse among mankind. The Golden Age makes a beautiful figure in poetical description; but we have not the least room to suppose that it ever existed but in the fine frenzy of the poet's brain.

The idea of property, and consequently of an exclusive right, would naturally follow the possession or enjoyment of any acquisition: and if, for the sake of argument, we admit such an absolute and hypothetical State of Nature, as some have imagined, yet we shall find, that even that could by no means be exempt from causes of contention.

In such an imaginary state, indeed, the desires of mankind must, for some time, have been confined merely to their wants, and their wants must have been few. The appetites of hunger, thirst, and love, with the convenience of shelter from the inclemency of the sky, made up the sum. The earth afforded various abodes equally commodious; the means of nutrition were open to every hand, and were every where the same in sufficient abundance. Little difference, therefore, could arise about subjects of property.

It may be said, That though we admit the subjects of property to have been equal and in common, yet *fancy* might have established a preference among them where there was really none, and consequently beget contention. But, to grant the advocates for the peace and simplicity of such a state all that can be desired, we will not insist on this nicety.

Mankind, however, being composed of male and female, and the former being attracted

tracted by a natural and irresistible propensity to solicit the society of the latter, self-love would prompt him to desire an exclusive right to the object of his affections. Others, excited by the same feelings, would endeavour to obtain their wishes, and would, for that purpose, rival his pretensions.

Hence arises a source of discord inherent in our very frame: for admitting that there were originally an equal number of males and females, yet all could not be equally desirable, and the contention would be for the most lovely: and this rivalry and jealousy were probably the first selfish affections.

It is true, that, under some civil institutions, such as, for instance, those of *Lacedæmon*, this kind of jealousy seems to have been utterly extinguished, by making it honourable for men to consign the partners of their affections to strange embraces, and prohibiting them from such a practice, by way of punishment for misdemeanors.

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But this does not prove, that, in a State of Nature, men would not be prone to such rivalry on one hand, and sensations of jealousy on the other : for it is well known, that the force of civil regulations will not only counteract, but will, in many respects, entirely pervert the natural affections. Witness the many savage and unnatural customs which have prevailed, and still prevail, among the *Indians*, and other barbarous nations, and which have been even established by their laws.

In truth, no affection of the mind seems to be more natural than that of jealousy. We may discover early proofs of it in infants ; and even creatures, who are wholly guided by instinct, shew marks of fond attachment to particular objects, and betray strong symptoms of jealousy.

These selfish affections are of a nature so destructive to the peace and order of society, that we find all states, which can boast of any refinement in their civil institutions,

have framed their laws with a design to obviate their ill effects.

Thus they have endeavoured to secure to every man an exclusive right in the partner of his affections. In this instance, Civil Laws are founded on the Law of Nature. The principle of union between the sexes, in a State of Nature, is mutual good liking. There were in that state no collateral motives of honour and interest to pervert the natural inclinations. Now Nature, or Conscience, or whatever we call it, tells us, that no one has a right to enjoy her whom another loves, and has, by her free consent, acquired the first possession of.

To tolerate such invasions would not only destroy the source of social felicity between the sexes, but weaken the relation between parent and child, and introduce universal discord and disorder.

The fond attachment between man and woman produces a satisfaction, which not
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only renders them easy in themselves, but complacent to others; and their mutual fidelity necessarily augments their tenderness towards the pledges of their love.

But when enjoyment becomes promiscuous, the attachment is weakened, if not totally destroyed: social happiness is then ever in prospect, but never attained. The father's claim to his progeny being thus become precarious and doubtful, and his affection towards them consequently diminished, the love of variety increases with the indulgence of irregular appetite, and begets nothing but confusion and contest.

Though this, however, was probably the first instance in which the selfish affections began to operate, yet occasions of contention soon multiplied. It is not reasonable to suppose, that all men were originally endowed with the same portion of intellectual capacity. Nature is various in all her works. The same variety is conspicuous in the intelligent, as in the material creation; and as men were not all framed
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with the same corporeal strength, neither were they all framed with the same intellectual powers.

The free-thinking Author of *L'Esprit*, has attributed the superiority of intellect in one man over another, to the different powers of application. But if we attend closely to the remarkable difference observable among infants, we shall be convinced that it must be derived from some other principle.

This difference between men is an endless source of strife and animosity, and must have afforded very early occasion of disagreement. Though in the primitive state, all the benefits of Nature might be enjoyed equally, and in common, yet, not only fancy might create an *imaginary*, but the difference between men's intellectual faculties would soon establish a *real* preference among them.

All men, by a natural impulse, would be directed to chuse the most proper retreat

retreat to shelter them from the inconveniencies to which the change of seasons; and the alterations of weather would expose them. When the heat scorched them, they would naturally retire to the thicket, or the first neighbouring shade. When they found themselves pinched by bleak winds, or incommoded by descending showers, Nature would prompt them to creep into the first opening cavern.

But men of superior sagacity, would improve the abodes which Nature presented, so as to make them more commodious for the various purposes of shelter; and would from time to time devise new conveniences. Others of less invention, but of selfish affections, would quickly become sensible of the good effects of their improvements, and perceiving the preference which those abodes had over their own, would form designs of dispossessing those who had framed such conveniences; and to this end would employ either treachery or force, or both.

They who, by their contrivance and ingenuity, had made dwelling-places apt and convenient for their habitation, would naturally conclude that they had a property, and an exclusive right to that spot, of which they were the first occupants, and which they had taken such pains to improve. In a State of Nature there being no other *original* way of acquiring property but by occupancy, it might be thought that such right was forfeited by *non-use*, but a continued personal occupation is inconceivable. Men must necessarily have been called from their abodes in search of sustenance, and for other occasional purposes. But whenever they went abroad, they would, if they had an intention of returning, still retain in their minds an idea of their property in, and their right to re-possess and re-occupy, the places which their necessities obliged them to quit for a while.

Others of selfish affections, regardless of this right, which is evidently founded on the dictates of Nature, and confiding perhaps in superior strength, would take advantage

vantage of their absence, and having usurped the occupation of their property, would endeavour to maintain it against the first occupant and lawful owner.

Nature would direct the party dispossessed, to use all means in his power for the recovery of his right. If he was conscious of superior or equal strength, he would attempt to regain it by force; if not, he would have recourse to stratagem.

In time, however, men would grow sensible, that where force or cunning was the measure of right, there could be no such thing as any permanent property. Even the most powerful would discover, that their superior strength or courage, conferred no lasting pre-eminence. They would find, that though it procured them immediate advantages, yet it was not effectual to preserve those advantages when gained. They would perceive, that many circumstances concurred, which placed men, weaker than themselves, ultimately upon an equality with them. They would

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would find, that they were liable to be conquered or injured by stratagem, that they might be assaulted from ambushes, or attacked in their sleep. In short, they would quickly be made sensible, that Nature has furnished every man with power to avenge his wrongs, and that the weakest, by watching opportunities, is master over the person of the strongest.

Thus the nature of things would teach men, that, *the best title to peace and security, is to do justice.* But though the light of reason points out the truth of this axiom to every intelligent being, and though it is a principle which no one can contravert, yet all will not make it the rule of their practice. Amidst the tumult of unruly appetites, this principle too often escapes attention, or makes but faint and inadequate impressions.

Human Nature is compounded of *Reason* and *Passion*. The latter impels us to action; the former is to direct our actions to right ends. Passion prompts us to pursue

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for some immediate and apparent good: Reason presents a prospect of real and remote advantages. But the far greater part aim at present gratification; without regard to the rights of others, or of their own future interest.—I say their own future interest, for it has been shewn, that, apart from all social or civil compacts, it is every man's interest to be just; since from the equality which Nature has ultimately established among men, no one can expect that his injustice will long remain unpunished. And it is evident, from the Light of Nature, that every *wicked* man must be also a *weak* man.

But as all men have not the same capacity to perceive their true interest, or sufficient command over their passions to pursue it, the immediate influence of ungoverned appetite would expose the greater part to frequent temptations of injuring each other; and injury on one side, would naturally occasion resistance, and provoke vengeance on the other; so that men would necessarily live in a state of inquietude and hostility,

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tility, while the right of private revenge subsisted.

The inconvenience and misery of such a state, first taught men the necessity of appealing to some indifferent and unprejudiced party, who might compose the differences between them, and redress their wrongs; for reason inclines every man to wish for a state of peace.

This leads us to inquire into the origin and progress of jurisdiction.

CHAP. IX.

Of the Origin of Jurisdiction.

IT has already been shewn, that a social state must have existed prior to any civil society: and if we resort to the condition of our first parents, we must conclude, that Nature having given them power over their offspring, parental Will

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was the sole Rule or Law which directed their children's conduct. When their progeny, however, attained to years of maturity, the parental authority necessarily ceased. It seems reasonable nevertheless to imagine, that parents still continued to exercise that kind of dominion, by virtue of their authority, which they before maintained by reason of their power. Children who had long been accustomed to obey, would not immediately withdraw themselves from subjection.

The maintenance of parental authority, however, must have depended on the dispositions of the children; and as their nature was more or less mild and tractable, the parental authority was more or less extensive and durable. For some are by nature so ferocious and untractable, as not to be restrained by mere authority, without power.

If a difference arose between two who lived in the same family, it would necessarily be referred to the *pater familias*, and

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his decision would undoubtedly be respected by those under his immediate power and authority. This therefore must have been the first kind of jurisdiction.

When mankind was so far multiplied as to separate into different families, it was natural and necessary for the children, when separated, to assume the same power over their families, which had been exercised over themselves. The government, if we may so call it, of each family being therefore still patriarchal, it must follow, that the rules of action, in such a state of society, must be various and discordant.

Whatever depends on arbitrary will, must be changeable and fluctuating. As men are differently organized, and are endowed with various degrees of perception and judgment, their conclusions with respect to right and wrong will frequently be different; and their wills, influenced by such conclusions, will take opposite directions.

So great is the imperfection of Human Nature, that the will of one and the same man will not be consonant and uniform. A change in the habit of body, the temporary influence of some ungoverned passion, and a variety of accidental occurrences, will affect the judgment and alter the will.

There are circumstances, it is true, concerning which the principles of mankind will be correspondent; and in which, such as are of natural and social affections, will also agree in point of practice.

That it is the duty of parents to nourish and support their helpless offspring, for instance, is a principle of humanity ingrafted in nature; and must be universally acknowledged. The obligation likewise not to offer unprovoked violence to another, is a principle which must be assented to by every one endowed with the light of reason.

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But the allwise Author of our being has not thought fit, that men in general should arrive even to that small degree of perfection, which the examples of some individuals prove to be attainable. If the best and wisest of men have not been able to reduce their appetites under the dominion of reason in every instance, we cannot be surprized that the far greater part should be slaves to passion and prejudice.

The influence of these principles must, in a State of Nature, have been attended with pernicious effects. If a dispute arose between parties of different families, it must be supposed that each Patriarch would be partial to those of his own tribe, and that they would consequently differ in their judgment; and thus the matter would be left open, and must be determined by force.

In time, however, they would not only perceive the inefficacy of such jurisdiction to prevent contests by force, but families would

would become too numerous for such patriarchal government. Mankind therefore feeling the ill effects of ungoverned force, and occasions of contest increasing as the subjects of property multiplied, they were naturally led to devise some means for compelling every one to regulate his actions in conformity with those principles, which the dictates of Nature pronounced just.

CHAP. X.

Of the Progress of Jurisdiction.

THE first expedient men would probably contrive to prevent the ill consequences of private revenge, would be to chuse some one of distinguished probity and understanding, whom they would appoint to determine all differences which should arise among them; agreeing at the same time to assist him in carrying his decrees into execution.

In this simple model of government, if it deserves that name, we cannot conceive

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any *legislative* branch. The powers were only *judicial* and *executive*. The Law, or rule of action, was declared *ex post facto*, as occasions arose.

It follows that the decisions of such an imperfect and arbitrary judicatory must unavoidably be vague and inconsistent. The magistrate biased by his affections, might, through partiality to one, or prejudice to another, decree wrongfully; add to this, that human judgment being influenced by a variety of external and accidental causes, he would probably, at different times, view the same circumstances in different lights, and his adjudications would of course clash with each other.

Was it reasonable however to suppose him so exempt from human frailty, as to be always just and consistent in his decisions, yet it would be too much to expect that his successors should inherit the same portion of understanding and integrity. Impelled by different motives, directed by
different

different lights, each perhaps would reject the conclusions of his predecessor, and pronounce different decrees.

Amidst this contrariety and contradiction, there could be no established rule, by which men could frame their conduct towards each other. Unjust or erroneous determinations would encourage the wicked to persevere in evil, and the injured would remain without any hope of redress, but from private revenge.

Mankind would be duly sensible of the mischiefs arising from such an imperfect system. Under the sense of evil, the mind is incessantly occupied in contriving a remedy.—And the remedy devised in this case, brought men on a step nearer towards a more perfect frame of government.

To prevent the ill effects of such repugnant and inconsistent determinations, they found it was necessary previously to frame certain established rules or Laws, by which

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the members of the community were to regulate their actions with respect to each other.

Having agreed on these previous Laws or rules of Action, they then chose some person in whom they could confide, and appointed him Chief Magistrate, under the obligation of judging all cases agreeable to such stated Laws, and of directing execution accordingly.

Hence perhaps, strictly considered, we may date the first origin of *Civil Compact*; and this, politically speaking, was the first kind of government.

These Rules or Laws, it is probable, were made with the joint consent, either tacit or exprest, of the whole body; and in all likelihood comprized every case which could arise in the narrow and circumscribed intercourse then subsisting among the members of the community,

But

But as the connections among mankind became more various and dilated, new cases daily evolved and multiplied, for which no provisions were made by the scanty code of Laws then in being. In all such cases therefore of a new impression, the magistrate must of necessity exercise a discretionary power, or there must be a failure of justice.

The exercise of such discretion, in these instances, would of course be productive of those evils which were experienced before the institution of the Laws in being, and which those Laws were intended to prevent. The return of this inconvenience, would suggest a farther improvement in government.

Men would now perceive the necessity of a chosen legislative body, who might be always at hand, to enact new Laws, with respect to fresh contingencies, so as to avoid a discretionary power in the magistrate, and at the same time expedite the demands of justice.

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The legislative body were, no doubt, composed of such, among the bulk of the people, as were most eminent for their knowledge and virtue; and, in all probability, the magistrates vested with the *judicial* and *executive* powers, made a part of the legislature.

It is likely, however, that the judicial and executive powers still remained united. No human institutions are completed on a sudden. We may conclude therefore that the separation was made by degrees; and this was a farther advance towards improvement.

The magistrates being under an obligation of judging according to known prescribed Laws, and the legislative body being attentive to provide for all new cases, they were in a great degree restrained from deciding according to caprice or partiality. But being likewise intrusted with the executive power, they might shew favour to, or indulge a prejudice against criminals or suitors,

suitors, by delaying execution, and other methods of undue procedure.

This inconvenience suggested the expedient of keeping the three powers of government separate and distinct. The first branch had the power of making the Laws; the second expounded them, when made, by applying them to particulars; and the third ordered the judgments of the second to be carried into execution. But the supreme power naturally resided in the first.

After the three powers were divided, and vested in different hands, inconveniences were still felt; which, while the concerns of mankind lay in a narrow compass, were seldom experienced or attended to, and were consequently not provided for.

The judicial power being entrusted with the exposition of the Law, and as it depended on their judgment whether the case or fact *sub lite*, was or was not within the description of the Law, here was evidently
a great

a great latitude still left for the exercise of partiality or oppression.

Men of the most consummate knowledge and unbiassed probity are still men. Be their judgment ever so acute, their hearts ever so uncorrupt, yet even too exquisite a sensibility of nature may in some cases misguide the one, and pervert the other. Affection and prejudice operate imperceptibly on men of lively sensations, and make them often unjust in those very instances wherein they flatter themselves that they are only generous.

Thus the Judges might, by too liberal a construction, sometimes involve cases within their jurisdiction contrary to the meaning of the legislature; at other times they might counteract the legislative intention, and, in consequence of too limited an interpretation, exclude cases clearly within the spirit of the law.

These abuses would quickly be perceived, and men would apply their ingenuity to obviate

obviate their ill consequences. The remedy which has been devised in this country, I mean the invention of *Juries*, is such as does honour to human policy; it being perhaps the most effectual means for the preservation of liberty, and the security of property, which human wisdom is capable of contriving.

CHAPTER XI.

Of Juries.

AT what time this happy institution was first introduced into this country, is difficult to determine. Some writers trace the institution of *Juries* no farther back than the *Normans*, and suppose they were introduced by *William the Conqueror*. Many deem them of earlier date, and derive their origin from the *Saxons*, who borrowed them from the *Britons*; but a late learned and elaborate treatise, intitled, *An Enquiry into the Use and Practice of Juries among the Greeks and Romans*, leaves lit-

tle room to doubt, but that the *Amagat* among the *Athenians*, and the *Judices* among the *Romans*, answered the end and use of *Juries* in our constitution; and that as the *Romans* borrowed them from the *Grecians*, we took them from the *Romans*.

It must be admitted, however, that this institution, which was originally intended as a guard against partiality, power, and oppression, is sometimes, though happily but seldom, attended with inconvenient effects. The Jury being composed of persons, whose knowledge is confined to moderate bounds, in proportion to their opportunities of information, it cannot be supposed that they are capable of discriminating the nice circumstances attending some cases, or even of comprehending the explanatory instructions of the Judge.

From hence it happens that the verdicts are sometimes capricious and erroneous; and as obstinacy is the undoubted offspring of ignorance, it is extremely difficult, and sometimes

sometimes impossible, to make them depart from their first determination.

With respect, however, to the duty or power of Jurymen, its extent is not yet positively ascertained. Some are of opinion, that they are judges only of fact, and not of law: but this doctrine has been strenuously controverted by others, who contend, that they are judges of law, as well as fact. The supporters of the latter doctrine say, that the Jury are to be determined in their verdict by their own knowledge and understanding; for that a man cannot see by another's eye, nor hear by another's ear; no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning; and they insist, that though the verdict be right, yet, if the Jury are not convinced it is so from their own understanding, they are forsworn *in foro conscientie*.

S E C T. II.

*Whether Juries are Judges of Law,
as well as of Fact?*

IN considering this important question, it will be proper to pay some attention to the forms of our legal proceedings in criminal matters. Indictments not only set forth the particular fact committed, but also specify the nature of the crime. Thus treasons are said to be done *proditore*, or traiterously. Felonies are said to be committed *felonice*, or feloniously. Public libels are said to be published *seditiose*, or seditiously; *et sic de ceteris*.

When a Jury, therefore, is impanelled upon the trial of a traitor, they are to try, not only whether the defendant is guilty of the fact of having corresponded with the enemy (or whatever the species of treason may be), but whether he is guilty of having corresponded with the enemy *traiterously*

or not. When they are impanelled upon the trial of a felon, they are to try, not only whether he killed such an one, or took such an one's property, but whether he killed such an one of *malice prepense*, or took such an one's property *feloniously*. In like manner, if they are impanelled on the trial of a public libeller, they are to try, not only whether he published such a writing, but whether he published it *seditiously* or not.

In short, in all these cases, it seems, from the words of the issue, that they are to try not only the *fact*, but the *crime*: in other words, they are to judge, not only of the *act done*, but of the *inducement for doing such act*, and to determine whether it be of the criminal nature as set forth in the indictment.

It may be concluded, not only from the general frame of indictments, but from the nature of the verdict in particular cases, that the Jury are vested with the power of judging of *law*, as well as *fact*.

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Indeed

Indeed many great lawyers seem inclined to the opinion that Juries are to determine upon the law, as well as fact. Lord Chief Justice *Vaughan*, in *Busshell's Case*, p. 150, reports as follows:—"But upon all general issues, as upon Not Culpable pleaded in trespass, *Nil debet* in debt, *Nul tort*, *Nul disseisin* in assize, &c. though it be a matter of law whether the defendant be a trespasser, a debtor, disseisor, &c. in the particular cases in issue; yet the Jury find not (as in a special verdict) the fact of every case by itself, leaving the law to the court, but find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicatedly, and not the fact by itself; so as, though they answer not singly to the question, what is the law? yet they determine the law in all matters where issue is joined and tried in the principal case, but where the verdict is special."

Lord Chief Justice *Hale* says, in his History of the Common Law, "As the Jury *assists* the Judge in determining matters of fact, so the Judge *assists* the Jury in determining

mining points of law, and also very much in investigating and enlightening the matter of fact, whereof the Jury are judges." Here it may be observed, that though his Lordship does not express himself with his usual perspicuity, yet he seems to be of opinion, that Juries are judges of *law* as well as *fact*. "The Judge (he says) *assists* the Jury in determining points of law," (which word *assists* implies the right of determination to be in the Jury), "and also (he adds) very much in investigating and enlightening the matter of fact, whereof the Jury are judges." Now the word *whereof* may at first seem only to refer to matter of fact; yet, taking the sense of the paragraph altogether, and considering the use of the copulative, it must be taken to refer both to *law* and *fact*.

But the true meaning of this passage is best explained by Lord Chief Justice *Hale* himself, who, in the second book of his *History of the Pleas of the Crown*, p. 313. expressly says, "That the conscience of the Jury must pronounce the prisoner guilty or

not guilty; for, to say the truth, it were the most unhappy case that could be to the Judge, if he at his peril must take upon him the guilt or innocence of the prisoner; and if the Judge's opinion must rule the matter of fact, the trial by Jury would be useless."

The learned Author of the Commentaries on the Law of *England*, b. iv. p. 354. says, That special verdicts set forth all the circumstances of the case, and pray the judgment of the court, whether, for instance, it be murder, manslaughter, or no crime at all. This is where the Jurors *doubt* the matter of law, and therefore *chuse* to leave it to the determination of the court, though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths, &c.

Upon a slight attention, it must be owned, as has been already observed, that the lodging this power in Juries is sometimes productive of inconvenience and injustice. To
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appoint twelve illiterate, and the greatest part of them perhaps ignorant men, to be the ultimate expositors and arbitrators of the law, with a power to controul and overrule the opinions and directions of the Judges, who have made the science of jurisprudence their study, and have been raised to the seat of judgment for their knowledge and abilities in their profession, appears at first sight to be a preposterous delegation. But many things, upon a slight and transient inspection, carry the appearance of absurdity, which may be reconciled upon a closer examination. It lies not within the reach of human wisdom to provide remedies against every evil contingency; the most it can do is, to avoid the greater evil; and perhaps, upon a more mature consideration, the vesting this power in the Jury will be thought the lesser inconvenience.

For if the Judge, who expounds the law, had the power of determining according to his own exposition, might not an inlet be opened for arbitrary and partial decisions?

Might not the Judge likewise as well be entrusted to decide concerning the evidence of the fact? For, by a latitude of construction, he might bring the fact within the severity of the law, contrary to the sense of the legislature; or, by a confined exposition, he might restrain it, to the hindrance of justice.

Thus the life and liberty of the subject might depend on the decision of one man, who might possibly, in some cases, be more likely to be biassed than twelve Jurors, totally indifferent to the parties concerned, who are sworn to give a true verdict, and must do it under the peril of a heavy punishment, and whose duty it is to state their doubts and difficulties, if any should occur, for the advice of the court. Is there not less to be apprehended from the occasional mistakes of judgment in twelve such Jurors, than the possible error of judgment or of will in the Judge, who, whatever be his knowledge or probity, is but a man?

Besides, it does not, in fact, often happen, that the Jury disregard the directions

or advice of the Judge. The opinion of the bench has generally its due weight; and, though Juries now and then give erroneous verdicts, contrary to the opinion of the court, yet their error may in most cases be rectified; and where it is remediless, it is the lesser inconvenience of the two.

Though the practice of punishing a Jury by attain for bringing in a verdict contrary to evidence, has of late years been disused, yet, in civil cases, a method more effectual to redress the wrong has been substituted, which is that of making application to the court, who, according to the circumstances, will grant a new trial. So that the party injured by their wrong finding, is not without a remedy.

If their wrong verdict indeed respects a criminal matter, a failure of justice in one instance seems unavoidable: for if they acquit the guilty prisoner, he cannot be brought to trial again for the same offence; but should they condemn him wrongfully, the case is not altogether without a remedy;

for the court of King's Bench may grant a new trial, and our constitution has wisely lodged a power in the Crown to remit the sentence,

C H A P. XII.

Of the Division of Courts.

WHILE the concerns of mankind moved within a narrow sphere, while their wants were few, their traffic small, their ideas of the relative duties of life imperfect, and their notions of political distinctions crude, their system of laws might have been, without inconvenience, simple and summary.

But as improvements and refinements increased their wants, as trading and commercial intercourse extended, as they acquired more enlarged ideas of the reciprocal duties arising from the various *natural* connections between man and man, as they became sensible of the necessity of establishing

ing and maintaining the *political* degrees of pre-eminence and subordination, every progression towards improvement must consequently have increased the volume of their laws.

As people multiply, and the subjects of property become more various, the modes of acquiring, maintaining, and transferring each distinct subject must increase in proportion. Amidst such extensive intercourse likewise the temptations to injustice and dishonesty will increase, and laws must be provided against every rising species of injustice and oppression.

As every civilized nation must have a sense of religion, and perceive the necessity of superadding divine obligations to strengthen human institutions, hence again arises a principal object of legislative attention.

In short, the growing multiplicity and infinite variety of concerns, which daily evolved as society ripened by civil institutions, must evince the expedience of classing
and

and distinguishing the various objects of jurisprudence, and of appropriating different courts for the cognizance of distinct subjects of jurisdiction.

It would not only be impossible for the same Judges to attend to such an endless diversity of causes, but the judgments concerning each, often depending on different principles, must in some cases unavoidably occasion a confusion and repugnance in their decisions.

Thus, in time, the boundaries between civil and criminal, and other various subjects of jurisdiction, were ascertained: And thus, as religion extended its sacred influence, its ministers claimed peculiar regard, various rights were annexed to their holy function, and several species of offence against the Divine Law were referred to the cognizance of ecclesiastical courts.

As the power of the supreme magistrate became more extensive and better secured, many rights and emoluments were annexed

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to his high office; and a court was found necessary to superintend the revenue.

As commerce spread her sails, and extended social intercourse to distant regions, the naval department became a necessary object of consideration; and courts of Admiralty were instituted to superintend and determine such matters as fell within the maritime province.

The several courts of Common Law being governed by stated rules, and deciding according to certain laws, it must necessarily happen, that those laws, calculated for the general good, must sometimes prove severe and injurious to individuals.

It is impossible for the subtlety of man to foresee, and obviate every inconvenience which springs in the course of civil intercourse. Nice and peculiar circumstances will vary cases apparently similar, and it would be impracticable for the legislator to comprehend and distinguish them, so as

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to draw the line between impunity and severity, injustice and oppression.

From hence arose the necessity of instituting a court of Equity, to moderate the rigours of the Common Law: A court of very early date and most extensive jurisdiction.

But to enumerate the several courts of justice, to give an historical detail of their first institution, and of the nature and extent of their several jurisdictions, is foreign to the design of the present essay. It will not however be improper to trace the origin; and give some account of the jurisdiction of the court of King's Bench, as being more immediately connected with the subject of these considerations.

C H A P.

C H A P. XIII.

Of the Court of King's Bench.

THE court of King's Bench was originally the only court in Westminster Hall, and the courts of Common Pleas and Exchequer have risen out of it. It was anciently the court where the king of *England* used to sit in person, and was therefore moveable with the court, or king's household, and called *Curia domini Regis*, or *Aula Regis*, or *Regia*: And by Stat. 28 Ed. I. chap. 5. the court is to follow the king.

This court hath supreme authority, the king himself being still presumed by Law to sit there, though judicature only belongs to the judges of the court.

Anciently the Chief Justice of the court, who was stiled *Summus Justiciarius*, or
 8 *Capitalis*

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Capitalis Justiciarius totius Anglie, was created by letters patent, but Edw. I. among other alterations ordained, that he should be created by writ, as is in use at this day.

The ancient dignity of this supreme magistrate was very great. He had the prerogative to be vicegerent of the kingdom, when any of our kings went beyond sea; being generally appointed to this office out of the greatest among the nobility. And he enjoyed that power alone, which was afterwards distributed among three other great magistrates; that is, he had the power of the Chief Justice of the Common Pleas, of the Chief Baron of the Exchequer, and of the Master of the Court of Wards. And he commonly sat in the king's palace, and there executed that authority which was formerly performed *per comitem palatii*, in determining differences which happened between the barons and other great persons of the kingdom, as well as causes criminal and civil between other men.

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But the power of this great officer became at length dangerous to government, and obnoxious to the baronage. And as the *Aula Regis* was obliged to follow the king's household wherever it removed, so that suits were attended with great delay and expence, it was thought right to appoint two other Justices; to each whereof were assigned a distinct jurisdiction, viz. to one the North parts of *England*, and to the other the South. And in the reign of *Edw. I.* these divided jurisdictions were reduced to one court; with a farther abridgment of their greatness, both as to the dignity of the Judges, and the extent of their jurisdiction; for these Judges were no longer chosen out of the nobility as formerly, but out of the commons, who were men of integrity, and skilful in the Laws of the Land.

The jurisdiction of this court, however, is still very extensive. The Justices of the King's Bench are sovereign justices of oyer and terminer, gaol delivery, and of eyre, and the supreme conservators of the peace,

and coroners of the land; and their jurisdiction is general all over *England*.

The Justices of the King's Bench have a sovereign jurisdiction over all matters of a criminal and a public nature, judicially brought before them; to give remedy either by the Common Law, or by Statute: and their power is original and ordinary; when the king hath appointed them, they have their jurisdiction from the Law.

Whatever crime is against the public good, though it doth not injure any particular person, comes within the cognizance of the justices of this court; and no subject can suffer any kind of unlawful violence or injury against his person, liberty, or possessions, but he may here have a proper remedy, not only by way of satisfaction in damages, but by the exemplary punishment of the offender: for this court is considered as the *custos morum* of all the subjects of the realm.

It is in the discretion of this court to inflict fine and imprisonment, or infamous punishment on offenders: and they may commit to any prison they think fit; and the Law doth not suffer any other court to remove or bail any persons imprisoned by them. Nevertheless this court may grant a *habeas corpus* to relieve persons wrongfully imprisoned, and may bail any person whatever.

This court formerly exercised authority only in criminal matters, and pleas of the crown; but now it is divided into a *crown* side and a *plea* side; the one determining criminal, and the other civil causes.

BOOK II.

CHAP. I.

Of Crimes.

IN proceeding to treat of our Criminal Laws, it will be proper, in the first place, to say something of the Nature, Source, and Degrees of *Crimes*.

SECT. I.

Of the Nature of Crimes.

THE word *Crime*, in our language, is often used with vague and indiscriminate application. It is frequently taken as synonymous with *Sin*, *Offence*, *Transgression*, &c.

Hobbes, however, distinguishes between a *Crime* and a *Sin*. All *Crimes*, says he,
are

are indeed Sins, but not all Sins Crimes. A Sin may be in the thought or secret purpose of a man, of which neither a Judge, nor a witness, nor any man can take notice; but a Crime is such a Sin, as consists in an action against the Law, of which action he can be accused, and tried by a Judge, and convicted or cleared by witnesses. Farther, that which is no Sin in itself, but indifferent, may be made a Sin by a positive Law. Nay, sometimes an action good in itself may, by the Statute Law, be made a Sin: as if a Statute should be made to forbid the giving of alms to a strong sturdy beggar, the giving such alms after the Law would be a Sin, but was not so before; for then it was charity, the object whereof is not the strength or other quality of the man, but his poverty.

But here, as well as in many other places, *Hobbes* seems to confound his own distinctions. The Law can never make that a Sin, which was good in itself before the making of the Law; though it may make that a *Crime* which was not criminal before.

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In truth, no act whatsoever, which is not *immoral* in itself, can be made *sinful* by any Law. On the contrary, if the Law, as Laws sometimes have done, should enjoin what is wicked and against the primitive obligations of reason and nature, it would be a *Sin* to observe it; though, according to the above definition, it would be a *Crime* to break it.—In short, whenever Civil Laws contradict the Laws of Nature, though the non-observance of the former may be a *Crime*, it cannot be a *Sin*.—Besides, men, through ignorance, or error of judgment, may violate the Law, and yet not be guilty of *Sin*.

It is so far therefore from being true, that all Crimes are Sins, but not all Sins Crimes, that the contrary seems to be the juster conclusion, viz. that all Sins are Crimes, but not all Crimes Sins.

What seems to have led to this inaccuracy is, the having considered Crimes only as contraventions to Human Laws; whereas, in a more liberal and just construction, every

every transgression against the Law of Nature, or the Divine or Human Laws, is a *Crime*: so that we may define a *Crime* to be a transgression of Law, for which the offender may be brought to judgment. And it is observable, that *ἡμίμα*, the Greek word from whence the English word *Crime* is derived, signifies *judicium* and *damnatio*.

It is true that, with respect to Human Laws, there is a material difference between a *Crime* and a *Sin*; for the latter may be committed by intention only, of which no human tribunal can take cognizance, unless it is made manifest by some actual attempt, though the design be not completed, and then it becomes a *Crime*; for of a *naked* intention no man can judge.

In the generally appropriated use of the words, *Sin* is chiefly applied to denote private offences, and *Crime* to express public transgressions.

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We find this distinction among the *Romans* between the words *crimen* and *delictum*; by the first they understood public and capital offences, by the latter, private and expiable injuries. They likewise made a very accurate distinction between *peccatum* and *delictum*: By the former they expressed acts of commission against prohibitory Laws; by the latter, acts of omission against mandatory Laws.

The *Romans*, however, often used these and other words of the like import indiscriminately, and we find *crimen*, *peccatum*, *delictum*, *noxa*, *culpa*, &c. synonymously applied.

We might select instances of this kind from many of the best writers, but it will be sufficient to produce one from *Cicero's* second Book *de Inventione*, where he says, *Non est mirum si nunc primum deliquerit, nam necesse est eum qui velit peccare, aliquando primum delinquere.*

The *Greeks*, in this respect, seem to have been much more precise; for ἀμαρτία

is most frequently used to signify *peccatum*, but the other words, ἑγκλημα αἰτία, &c. are applied indiscriminately.

But though in our language there is a clear difference between a Crime and a Sin, considered with reference to human jurisdiction; yet when taken in a more enlarged sense, as including Divine cognizance likewise, the difference vanishes: for every intention or resolution of the mind to do an unlawful act, though the doing of it be prevented, is a Crime before God.

The judgment which the understanding passes on our moral conduct, by which we are made sensible how far our actions are conformable to the will of that superior from whom we derive all our faculties, is what we call *conscience*: and every thing which we do against the suggestions of conscience, as well as every thing we omit to do, which conscience enjoins as a duty, is in a greater or lesser degree a Crime, and a breach of the Law of Nature.

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In this enlarged acceptation I shall use the word; and taken in this sense, Crimes may be considered, either as they regard ourselves, or as they concern others. There are duties relative to ourselves as well as to others; and every breach of duty is a Crime.

Man having by Nature the liberty of using his faculties conformable to right reason, it follows, that every abuse of his faculties in committing, or omitting any act, against the dictates of right reason, is in some degree a Crime.

Ebriety, consequently, where it is wilful and not accidental, and all acts of intemperance, though their consequences may terminate only in ourselves, may be ranked among the lesser species of Crimes, as being contrary to the Law of Nature.—

Offences committed through ebriety, lust, &c. are by *Aristotle*, and others, called mixed Crimes; as being partly voluntary, and partly involuntary.

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But indeed, strictly considered, though these Crimes immediately affect ourselves, yet consequentially, and remotely, they may concern others; not only as the bad example may influence others to the like transgressions, but as ebriety, lust, and other acts of intemperance, dispose and provoke us to do things to the prejudice of others.

It is for this reason, that the Municipal Laws of most countries have provided penalties against acts of intemperance, not so much as they immediately respect the individual, but as they consequentially endanger the order and safety of society; the preservation of which ought to be the object of all human laws.

It is indeed to be wished, that human laws were more attentive to prevent and restrain all acts of excess and intemperance, and all those slighter offences *contra bonas mores*, which certainly lead to the commission of enormous and capital Crimes. Slight penalties, properly enforced, for the breach
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of these lesser duties, might obviate the necessity of severe and sanguinary punishments.

To make good citizens, we should begin *a priori* to make good men; whereas human laws sometimes follow a most preposterous and inverted method *a posteriori*. But we may be assured, that bad men can never make good citizens; and it is only by correcting the morals of the former, that we can render the latter useful in society.

Punishments which remove a member out of the community, weaken the whole body; whereas wise regulations, and moderate penalties *a priori*, strengthen society, by obliging every individual to the practice of moral duties.

Having said thus much of the Nature of Crimes, let us proceed to inquire into the Source of Crimes.

S E C T.

S E C T. II.

Of the Source of Crimes.

THE Source of Crimes may be considered either as general or particular. The general Source of Crimes arises from the mistaken apprehensions of those who prefer some present and apparent good, to the prejudice of their future and real interest; for as every man naturally wishes his own good, his actions are therefore directed to what he conceives will have a tendency to that end.

The particular Sources of Crimes are pride, envy, ambition, lust, avarice, hatred, revenge, and every other selfish affection indulged to excess: and these passions will operate with greater or less force, in proportion as the objects which excite them are more or less considerable.

It is indeed impossible wholly to extirpate these causes of delinquency; but we
may

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may nevertheless weaken their influence, and obviate their effects. The seeds of pride, envy, ambition, &c. though inherent in our nature, may be checked in their growth. The force of education will contribute greatly to restrain their progress; and what education is to individuals, good laws are to the whole community.

Where the government is most just and equal, the citizens will be most virtuous, and consequently most happy. As we remove the causes which inflame pride, envy, ambition, &c. we prevent the consequences of them, treachery, rapine, and slaughter,

The vast disparity which human policy hath established among beings whom Nature made nearly equal, is one of the most fertile Sources of those Crimes and calamities which disturb and distress mankind,

It is however very apparent, that a certain degree of pre-eminence and subordination is established by Nature; and if we attend to the visible disproportion of intellectual

lectual and corporeal faculties among the human species, even in a state of infancy, we may reasonably conclude, that some are formed for more arduous and liberal pursuits, others for more common and servile employments:—in short, that some are born to govern, others to obey.

Nature, however, could never have intended such a disproportion, as enables one man to abuse her gifts, to turn affluence into luxury, and pre-eminence into tyranny; while another is precluded from the common benefits she has bestowed, deprived of every opportunity to cultivate and improve reason, and sometimes left destitute even of the means to nourish his body, and preserve his existence. Nature could never have intended such extremes as between the despotic tyrant and groveling slave. But, what is more, Nature is not accountable for that inversion of her order and decrees, that often gives the man a right to command, whom she formed to obey.

There

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There is a consciousness in most men, which tells them, that the disproportion which policy has established is injurious and unjust. There is in human nature a restless spirit of competition, which begets in men a desire of equal distinction and power with others exalted above them; and they conceive, that an addition of riches and authority will afford them an increase of happiness.

All, however, have not the virtue and discretion to persevere in a course of laudable emulation, and to seek the attainment of their wishes, by their own unwearied labour and application. The greater part will have recourse to fraud or force, in order to advance their fortune, and obtain what they conceive to be the means of felicity.

How much stronger then will be the temptations to violence and rapine, in such where the inequality is so great, that their abject state deprives them of every means of cultivating their reason, leaves them untutored

tutored by education, unassisted by good example, and even destitute of the common benefits of nature.

Under these circumstances, should urgent necessity instigate the wretched to injustice, may it not be asked, whether their Crimes are not, in some measure, the natural consequences of their unequal lot in society? Do not Civil Laws punish them for Crimes, which Civil Institutions lead them to commit? And does not the true source of their delinquency arise from a defect in legislation?

S E C T. III.

Of the Degrees of Crimes.

PUFFENDORF, who is very minute in his marking the Degrees of Delinquency, reckons those Crimes to be most heinous, which directly tend to the dishonour of the Supreme Being; in the next class, he ranks those which are offensive to human

human society in general; then such as disturb the public peace of the city; and after these he places Crimes which regard individuals, which he subdivides into Crimes affecting either life or member. In the next rank, he classes Crimes tending to disturb or defile private families, of which matrimony is the support; though *Philos-Judeus*, as he observes, ranks adultery before homicide. In the next degree, he considers Crimes which prejudice or destroy those things which are subservient to the necessities or conveniencies of life; and in the last, those which injure the fame or reputation of the citizen.

Montesquieu, who seems to agree in substance with *Puffendorf*, reckons four Degrees of Crimes. Those of the first class, he says, shock the religion; those of the second, the morals; of the third, the peace; and of the fourth, the security, of society.

These several Degrees of Delinquency correspond, in a great measure, with the arrangement

arrangement in the Decalogue, in which the Crimes respecting religion and morals are placed before those which concern property, or the political welfare of society.

But indeed, without any other guide, we are led to this arrangement by the obvious direction of natural reason, which teaches us that causes are anterior to effects. Offences against religion and morals, therefore, should be considered in the first place, since they certainly are the foundation of every other species of delinquency.

This shews the inaccuracy of the divisions in our Criminal Laws, in which, by an erroneous and unnatural arrangement, the Crimes against the primary laws of religion and morality are postponed to those of a secondary nature, which relate to the political interest of society.

This perverted order has been owing to the strange and groundless distinction which has been established between moral and

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political virtue; a distinction founded on sophistry, nursed by state policy, and upheld by vulgar prejudice.

It must be observed, however, that as there are Degrees of Delinquency in Crimes of different natures, so there are likewise Degrees of Guilt in Crimes of the same nature. In the latter, the difference arises from the greater or less degree of malignity perceptible in the criminal act. Many nice and subtle distinctions of this kind are particularly mentioned and observed upon by *Ant. Matthæus, Grotius, Puffendorf*, and other writers; but an attention to such subtle distinctions does not properly fall within the province of a legislator; for it is impossible for laws to anticipate and distinguish the particular circumstances which may palliate or aggravate the same species of offence. This is more properly the office of a Judge, who is vested with a discretionary power of adjudication, according as the intention of the delinquent appears to have been more or less criminal.

The consideration therefore of these refined distinctions is unnecessary here, as the principles of our Constitution do but in a few cases admit of a discretionary power in judgment; though, where particular circumstances appear favourable for the delinquent, and are reported to the Sovereign, they may obtain a remission of the sentence.

But even the Sovereign cannot, except in case of nobility, alter the sentence of the law, and decree a lighter or more grievous punishment, according as there appears to be a greater or less degree of malice and iniquity in the circumstances of the criminal act. Therefore all that the writers above-mentioned, and others, have learnedly written about proportioning of punishments to the different degrees of atrocity which distinguish Crimes, is by no means applicable to the Nature of our Criminal Laws.

From these observations with respect to Crimes, let us pass in order to the consideration of Punishments.

C H A P. II.

Of Punishments.

Punishment has been briefly defined by *Grotius*, to whose definition *Selden* and *Puffendorf* subscribe, to be "an evil of suffering on account of some bad action; *malum passionis ob malum actionis*." But this does not seem to be a complete definition; for many evils may be suffered in consequence of some bad act, which cannot properly be called Punishments. Besides, Punishments are often inflicted, not only for crimes of *commission*, but also of *omission*; which last are not at all comprehended within the above definition. More amply defined, therefore, *a Punishment is an evil which a delinquent suffers unwillingly, by the order of some lawful superior, on account of some act done which the law prohibits, or of something omitted which the law enjoins.*

From hence it follows, that any pain or suffering, willingly sustained, such as the penance or mortifications enjoined or suffered by *Romish* priests, or any misfortunes or losses which we suffer by necessary consequence, cannot be considered as Punishments. It is, for instance, a misfortune to a child to be reduced to beggary on account of the forfeiture of an offending father, but it is no Punishment. The evils likewise which subjects suffer, from the weakness or iniquity of government, are misfortunes, but not Punishments. These cases, as *Puffendorf* observes, who agrees in his reflections with *Selden*, are fatalities incident to mankind, such as fire, shipwreck, sickness, &c.

Accidents also which happen in consequence of delinquency, cannot be deemed Punishments: As where a delinquent, in the prosecution of a criminal act, loses his health, or is beaten or wounded; the pains or sufferings inflicted on him by the party injured, or by any other than the

sovereign power, are not, properly speaking, Punishments, but acts of hostility.

From what has been said, it appears, that *Punishment* is not only an evil suffered unwillingly, but is also inflicted by some lawful superior, on account of the violation of some mandatory or prohibitory law. As the learned *Selden* observes, the antecedent crime is the essence of Punishment; and he very properly objects to that remark of *Plato*, which is in substance, *Non punitur quia peccatum est, sed ne peccetur.*

After defining what Punishment is, the next step leads to consider the Quality and Proportion of Punishments.

S E C T. II.

Of the Quality and Proportion of Punishments.

IT has been much disputed among the learned, whether Punishment is to be directed according to commutative or distributive justice.

They who refer it to distributive justice argue, that as more grievous Punishments are inflicted on enormous offenders, and slight ones on more petty criminals, therefore their quality is distributive. To which it has been answered, That the Proportion observed in Punishments is consequential, or by accident; and that such Proportion is not the first or principal object of consideration; for that, in inflicting Punishments, it is not necessary to compare one crime with another, and weigh the proportion they respectively bear, in order to adjust adequate Punishments to each; but

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that every crime should be examined abstractedly, and a heavier or lighter Punishment decreed, as is most requisite for the public good.

But this answer does not appear satisfactory; for, in order to regulate the degree of Punishment which it is requisite for the public good to inflict for different crimes, a comparison must be made between the different species of offence; and before it can be determined, what degree of Punishment is necessary for the public good, we must carefully examine, in what degree the public safety or happiness is injured or endangered by the crime in question; which examination necessarily supposes a previous comparison between the respective criminal offences.

Private men indeed may, in the heat of revenge, consider an injury by itself, without any comparative view; but the calm and dispassionate mind of the legislature, in adjusting Punishments with a view to the public good, is naturally and unavoidably

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led to a comparison of the crime under consideration with other crimes which injure society.

They who are of opinion, that Punishments are to be referred to commutative justice, seem to imagine, that Punishment is due to offenders in the nature of a contract. The judicious Author of the Historical Law Tracts has accurately traced the consequences arising from this principle of considering Punishment as a debt, and has shewn how this notion made room for compositions, which by degrees took away the right of private revenge,

Nothing more, however, can be meant by saying, that Punishment is due to him who has offended, than that the magistrate has a right by law to inflict Punishment on an offender; for he to whom any thing is due, or the creditor, has a right to demand the thing due from the debtor; but it would be absurd to say, that the criminal hath a right to demand Punishment from the magistrate.

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If we consult the evident and natural operations of the mind, we shall find, that we cannot consider in what degree the public good is injured or endangered, unless we at the same time consider the *degree of the crime* in question, in a comparative view, with regard to offences of a similar kind. As for instance, if a *riot* is the kind of offence under contemplation, the mind of the legislator is unavoidably led, by a train of ideas, to compare it with the greater or lesser species of offence.

As the mind naturally rises in its comparative view, if it compares this offence with *rebellion*, it perceives, that the latter tends more immediately and directly to the prejudice and danger of the public good, than the former. Again, as the mind lowers the scale of comparison, and compares a *riot* with a *private assault*, it perceives, that the former hath a more immediate and direct tendency to injure the public than the latter, and consequently concludes, that a *riot* is an intermediate offence, which ought not to be punished

so grievously as an act of *rebellion*, and yet more severely than a *private assault*. So that the legislator does not consider the crime by itself, but examines it with reference to other offences, and regulates his Punishments according to distributive justice.

Montesquieu, likewise, seems to declare in favour of distributive justice; as is evident from the contents of the 4th chapter of the 12th book of his *L'Esprit de Loix*; and also in the 16th chapter of the 6th book, where he says, "It is essential to observe
" a certain harmony among Punishments,
" because it is essential to prevent a greater
" Crime rather than a less *."

It remains now to consider the different Ends of Punishment.

* Il est essentiel que les peines aient de l'harmonie entr'elles; parce qu'il est essentiel que l'on evite plutôt un grand crime, qu'un moindre.

S E C T. III.

Of the different Ends of Punishment.

MANY have considered the Ends of Punishment only under a twofold division; that is, with respect to the amendment of the delinquent, and the example of others: to which some have very properly added a third, which is, retribution to the injured.

The circumstance of example, which is so often insisted upon, does not seem to have so much weight as is often ascribed to it; for delinquents are frequently hardy enough to perpetrate the most atrocious Crimes, even when malefactors are, for the same offences, expiring before their eyes, with all the dreadful circumstances of agony and infamy. Men whose depraved dispositions lead them to the perpetration of capital offences, are slightly, if at all, affected by the sufferings or punishments

nishments of others. The violence of their inordinate and vicious appetites over-rules all considerations of danger to themselves, and effaces all impressions made on them by the deplorable fate of other offenders. Their imagination presents nothing to them but the advantages they expect to reap from their successful villany on one hand, and the delusive hopes of concealment or impunity on the other.

If ever the dread of punishment, or the terror of example, comes across their thought, such reflections are soon obliterated by the more flattering prospects which strike their senses, and corrupt their judgment. The End of Punishment, therefore, with regard to example, appears to be of less consideration than is generally imagined.

Grotius divides the different Ends of Punishment into three distinct species of utility: the first, regarding the offender; the second, respecting the party injured; the third, concerning every one indiscriminately:

minately : and in those divisions *Puffendorf* follows him.

It would be to no purpose to enter into their nice disquisitions about the right of inflicting Punishment in a State of Nature, and to whom it belongs. It seems needless to prove, that such right naturally belongs to parents or preceptors : but *Puffendorf* seems to be just in his objection to *Grotius*, who thinks it appertains to every one who has judgment to exercise it, and is not contaminated with the same vices.

Nothing however seems more evident, than that the kind of Punishment, which has for its End the amendment of the delinquent, cannot be extended to death ; and *Puffendorf*'s objection to this position, seems to be rather subtle than solid. Where wickedness is incorrigible, he observes, the juster opinion is, that it is better for the delinquent not to exist any longer ; and he quotes a number of authorities in support of this reflection.

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When we speak of Punishment with respect to the amendment of the criminal, we certainly mean his amendment in this life, which is absolutely defeated by putting him out of the world; and therefore the discussion of this point does not properly belong to this head, which considers the End of Punishment with respect to the amendment of the criminal. Whether it be for the benefit of a delinquent, deemed incorrigible, to be excluded from society, or to remain in it, is more than human judgment can determine: For it is at least possible, that the delinquent whom we suppose irreclaimable, might, if indulged with life, forsake the habitude of evil: and we assume greater sagacity than belongs to our finite comprehension, when we presume to decide, whether it is better for a criminal, with respect to himself alone, to die or live.

Besides, when shall we pronounce a delinquent to be irreclaimable? As men, who labour under dangerous bodily diseases, often recover after they have been deemed

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incurable; so criminals, though arrived to the most excessive pitch of profligacy, often reform after they have been judged irreclaimable. There is a stronger analogy between the natural and political body, than is generally supposed. Now, should we not condemn a Physician who should order his patient to be put to death, because he conceived it to be beyond the power of medicine to restore him? How then shall we justify the legislator who commits his political patients to the hands of the executioner, perhaps on the first appearance of a dangerous distemper, without applying proper remedies to procure their recovery?

In political, as well as in natural maladies, we must leave something to the operations of Nature. Her efforts often accomplish what human art and policy cannot effect; and it seems to be the most unpardonable rashness and injustice, to consign criminals to death as irreclaimable, without trying every expedient to work their reformation.

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This End of Punishment, however, which *Selden* reckons among the final causes, and which proposes the reformation of the offender, should be pursued with great caution and moderation. And as Punishments of this kind do not extend to death, they should be calculated rather to reclaim the delinquent by their equity and lenity, than to drive him to despair by their rigour and ignominy; for it is much safer to deprive a criminal of life, than to render him desperate in society.

As to the second End of Punishment, which regards the benefit of the party injured, that, according to the writers above quoted, is obtained either,

1st, By cutting off the delinquent.

2dly, By depriving him of the means of doing mischief, which may be effected by his imprisonment or banishment. Or,

3dly, By reclaiming him from evil.

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Through these several heads *Puffendorf* follows the steps of *Grotius*, though they both seem to have treated this point but superficially. They consider the right of private revenge, directed to the ends above enumerated, as exercised, either by the injured person himself, or by some indifferent party; but under this head, which respects the interest of the party injured, they have taken no notice of specific retribution, which seems to be a very material point for consideration; for though the death, imprisonment, or banishment of the criminal, may be considered as some sort of recompence to the injured, yet, if properly analyzed, it is, with respect to him, rather a gratification of revenge, than a retribution. The suffering of the criminal is of no more real service to him, than it is to any other individual in society, farther than as his passions are more irritated. The End of Punishment, therefore, with respect to the interest of the injured, is not answered, when no real utility or recompence results to him, and he reaps no other satisfaction than that of private revenge: for
 revenge,

revenge, though it is a reasonable foundation, yet it is by no means a just End of Punishment, which ought, where it is practicable, to provide recompence for past injuries, and security against future wrongs.

With regard to the third End of Punishment, as it concerns every one indiscriminately, the modes of accomplishing it are the same with those mentioned under the last head; for the general interest and security can be procured by no other means, than by putting the delinquent to death, by confining, banishing, or reforming him.

The head of specific retribution, however, does not belong to this End of Punishment, since that can be due only to the injured party himself.

The foregoing reflections, respecting Crimes and Punishments, will prepare the way for the consideration of Criminal Laws.

C H A P. III.

S E C T. I.

Of Criminal Laws.

IT is reasonable to suppose, that, at the first institution of human polity, the enacting of Laws in Criminal Cases was the principal, if not the only object of legislative attention; and as Criminal Laws seem to have been the first, so they still continue to be the most important concern of legislation.

The celebrated *Montesquieu* observes in his *L'Esprit de Loix*, that the liberty of the Citizen depends principally on the excellence of the Criminal Laws.

All nations, therefore, more especially ours, which boasts of Liberty for the principle of its constitution, ought to be particularly

ticularly solicitous to carry their Criminal Laws to as great a degree of perfection as human policy is capable of advancing them.

In order to approach the nearer to this perfect state, we ought always to keep in view the ends which we propose to accomplish by enacting of Criminal Laws.

S E C T. II.

Of the Ends of Criminal Laws.

EVERY wise legislature will, in the the enacting of Criminal Laws, have it in contemplation, rather to prevent than to punish Crimes; and while they chastise the delinquent, will endeavour to reform the man.

The objects of their concern, therefore, will be,

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1st, By the judicious penning of the Law, to create, by reasoning, *a priori*, a detestation of the crime forbidden. It is not sufficient that a Law is merely prohibitory and penal, but it ought first, by dint of reason and persuasive argument, to convince the judgment, that such prohibition and penalty are just and expedient for the good of society; for men, in moderate governments especially, are to be led more by reason than terror,

2dly, Their next care will be, to adapt and proportion Punishments, as nearly as may be, to the different degrees of offences.

3dly, They will ordain, that reparation may, in all cases where it is possible, be made to the party injured, by the Criminal: For all Laws are imperfect which, by the punishment of the delinquent, tend only to gratify the revenge of the prosecutor, without providing for his recompence.

4thly,

4thly, and lastly, They will ordain, that satisfaction be made to the State for the injury done to the government, by disturbing the peace, or violating the purity of society.

These seem to be the principal objects which the Law of Nature, and right Reason have pointed out for the attention of Law-givers. All political Laws which contradict the Law of Nature and Reason, are absurd and unjust. Governments are relatively good or bad, in proportion as their political institutions are conformable to those immutable Laws.

But as most States, and our own in some degree, appear to be governed by a system of policy not only inconsistent with, and repugnant to these native Laws, but also contrary to the constituent principles of their respective governments; it will be worth our enquiry to examine the frame and tendency of our Criminal Laws, both with respect to the principles of natural reason and of state policy.

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S E C T. III.

Of the Criminal Laws of England.

THE severity of our Criminal Laws is not only an object of horror, but the disproportion of them is a subject for censure. All degrees of offence are confounded; all proportion of punishment is destroyed. They breathe too much the spirit of *Draco*, who used to say, that he punished all crimes with death, because small crimes deserved death, and he could find no higher for the greatest.

But if we attend to Reason, the mistress of all Law, she will tell us, that punishments should, as nearly as possible, bear proportion to the offences committed; and that it is both unjust, and injurious to society, to inflict death, except in cases where the offender appears to be incorrigible.

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Two questions naturally occur, on the examination of this subject :

1. Whether the magistrate has a right to take away the life of a delinquent, otherwise than in cases which would endanger the public safety.

2. Admitting such right, whether there is a necessity for exercising it.

CHAP. IV.

SECT. I.

Of the Right of inflicting Capital Punishments.

WITH respect to the Right of Punishment in general, it must be allowed, that the magistrate can have no power, but what he either derives originally from the people, who, by common consent, agreed to resign their natural rights for certain purposes, and under certain

tain conditions; or what he acquires by necessary implication, as means requisite to the end of government for the common good; upon the principle, *Salus populi suprema lex.*

Now, it is clear that the people could not possibly transfer a right which they could not lawfully claim themselves. It will be allowed, that no one has a right to take away his own life; consequently, since he himself can, in no extremity whatever, put an end to his own being, he cannot have given the magistrate a right of inflicting death upon him; and the arguments which would endeavour to prove the affirmative, might with equal force be applied in vindication of suicide.

It is indeed alledged by the writers on this subject, that the right in question is not transferred, but relinquished, which is a nicety not readily conceived.

Puffendorf argues, that as Punishment is something inflicted on the unwilling, and

as that cannot happen against a man's will which he brings upon himself, therefore it is difficult to explain how a man can have the faculty of punishing himself, and be capable of making a transfer of it to another.

This difficulty he endeavours to solve thus:—As, says he, in natural bodies, by the mixture of many simples, a compound may be produced, in which qualities are discovered not to be found in any of the simple ingredients; so bodies politic, composed of several members, may have rights resulting from their union, which are not inherent in any individual: therefore, continues he, the magistrate or supreme body politic may have a right of inflicting punishments, which was not before in any individual: and this, he adds, is easily accounted for, if we suppose that every one binds himself, not only to protect others, but to bend his whole force against him whom the magistrate deems worthy of punishment.

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To this it may be objected, That in this obligation, by which every one is supposed to be bound, the criminal himself must be included; and *Puffendorf* had before very justly observed, that no one can be under an obligation of devoting himself to punishment; consequently this way of reasoning does not solve the difficulty. His arguments indeed, on the whole of this point, seem rather specious than satisfactory, and his objections rather verbal than substantial.

It is true, that the right of inflicting punishments, *eo nomine*, was not in any individual previous to civil institutions; for Punishments, strictly considered, are creatures of Civil Society.

Nevertheless, individuals, in a State of Nature, having a right of private revenge, though every exercise of such right is, properly speaking, an act of hostility, and not a punishment; yet Punishment, or the civil right of public vengeance, was substituted in lieu of such natural right of private revenge,

venge, which belonged to every individual in a State of Nature. So that the distinction appears to be merely verbal; and what in a State of Nature was a right of private revenge in every individual, is, in Civil Society, a right of punishment in the magistrate.

From hence it is evident, that the right of punishment in Civil Society cannot justly be extended beyond the limits which reason prescribes to private revenge in a State of Nature*.

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* The Author of the Historical Law Tracts observes, "That resentment, when confined within due bounds, is authorised by conscience. The delinquent, says he, is sensible that he may be justly punished; and if any person, preferably to others, be intitled to inflict the punishment, it must be the person injured. Revenge, therefore, he concludes, when provoked by injury, or voluntary wrong, is a privilege that belongs to every person by the Law of Nature; for we have no criterion of right or wrong more illustrious than the approbation or disapprobation of conscience: and thus the first Law of Nature respecting society, that of abstaining from injuring others, is enforced by the most efficacious sanction."

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This right of private revenge may be surrendered or transferred to the magistrate; but no one can give the magistrate an arbitrary right over the life of another. Even in a State of Nature, one man could not justly take away the life of another, but in case of absolute necessity to save his own. Every one has certainly a right to defend his person and his property against violence, and to kill the assailant, if he cannot otherwise secure himself and his possessions.

The defence of our possessions, ultimately considered, is in fact the defence of our persons; for if an aggressor invades our property with force, and we are resolutely determined to maintain it, our person then becomes the immediate object of defence.

It is well observed in the Commentaries on the Laws of England, B. iv. that the right of punishing crimes against the Laws of Nature, as murder and the like, is, in a State of mere Nature, vested in every individual; and that the first murderer, *Cain*, was so sensible of this, that we find him in *Genesis*, chap. iv. ver. 14. expressing his apprehensions, that whoever should find him would slay him.

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But all expedients should be tried before we proceed to this deadly extremity. That nothing but apparent necessity can justify the slaying of the aggressor, is evident from the tenor of our laws, which declare, that the danger, in which the slayer is, must be so great, as that it appears to have been otherwise inevitable; and that the defence ought to be always even unblameable, and not to take revenge.

The law will not allow it to be justifiable, in case of *se defendendo*, to kill any one, even though we are assaulted, if the party could fly from the danger; and the Law will not countenance feigned flight, in order to gain breath, and fall on afresh, but it must be a flight from necessity, as far as the party can, until he is driven by the assailant to a wall, ditch, river, or some such extremity, so that there is a moral impossibility of escaping his pursuit.

The reasoning upon which this principle of law is founded, plainly demonstrates, that necessity alone can justify us in using
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our power over another's life; and at the same time proves, that we actually retain, and may lawfully exercise this right in all such cases of emergency.

Hence, therefore, it may be concluded, that we have not parted with the right of inflicting death to the magistrate, since we retain it in the only instance in which we can lawfully exercise it. Indeed it is, in its own nature, *incommunicable*; for, as it appears that we can only use it on the occasion above specified, when our own life is in immediate or unavoidable danger, consequently, before the magistrate can interpose, that occasion ceases.

But if this right is thus incommunicable, it may be asked, whence the magistrate derives the power of life and death, which he has an undoubted right to inflict in cases of murder?

To answer this question, it will be necessary to consider the natural right of revenge in a more extensive view. Hitherto we have

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have examined it, only so far as it belongs to the party injured or attacked; but there are relative, as well as absolute rights.

Men, in a State of Nature, have not only a right to defend themselves, but they have a right, nay it is a duty enjoined them by the Law of Nature, to protect and defend each other; and this obligation is more or less binding, as the relation or connection between them and the party injured is more or less remote.

If, therefore, one is unjustly attacked, and in danger of being overcome by equal force, the Law of Nature enjoins every one present to yield him assistance; for it is a common cause to resist lawless might. The assistant therefore, or second, has the same right of resistance against the aggressor as the party injured; and, if he cannot otherwise subdue him, may lawfully kill him.

If, for want of assistance, the party attacked is slain by the aggressor, a right of vengeance belongs to those who survive him;

him; and they will be more or less keen in the prosecution of this right, as they were more or less intimately connected with the party slain.

As the Author of the Historical Law Tracts judiciously observes, every heinous transgression of the Law of Nature raiseth indignation in all, and a keen desire to have the criminal brought to condign punishment. Slighter delinquencies are less regarded. A slight injury done to a stranger, with whom we have no connection, raiseth our indignation, it is true; but so faintly, as not to prompt any violent degree of revenge. The passion in this case being quiescent, vanisheth in a moment; but a man's resentment for an injury done to himself, or to one with whom he is connected, is an active passion, which is gratified in punishing the delinquent in a measure corresponding to the injury.

Now, in the case of murder, nothing can correspond to the injury but the death of the delinquent. The deceased is not in being;
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consequently no reparation can be made to him. And it is against the obvious suggestions of Reason to suppose, that a pecuniary or other satisfaction or composition with the relations, can atone for a voluntary homicide.

The Author above quoted says, that such compositions were only considered as reparations in a gross way of thinking.

A crime of this nature therefore is in-
expiable in this world; for as the offender must be sensible, that the consequence of the criminal act deprives him of an opportunity of making reparation to the party slain, he should likewise be made sensible, that no satisfaction to those prejudiced in the second degree, can absolve him from the penalty due to his crime; for Reason pronounces, that a delinquent who has committed a crime inexpiable in this life, should be excluded from existence in this world.

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This right of vengeance belongs not only to the relations of the deceased, but to every one in a State of Nature; for it is every man's concern and interest, to secure himself against a delinquent who is so depraved and desperate as to commit a crime of an inexpiable nature. Every one may apprehend that it may be his own turn, and there can be no security against a murderer but his death.

Against other injuries a man may not only take security, but, in case of violation, may obtain satisfaction; whereas, against a murderer, no security is valid, since he can obtain no recompence, if it prove ineffectual. The vengeance therefore taken on a murderer, is not a revenge of triumph which regards the crime past, but it has for its object the future safety of all; and vengeance directed to this end may, in a State of Nature, be lawfully exercised by any one.

Cicero, speaking of the Rights of Nature, which he says are not founded on opinion,

but innate in us, mentions revenge by way of illustration. Revenge he defines to be, that by which we repel violence and injury by means of defence and vengeance.

Was it necessary, many authorities might be adduced to prove this natural right of revenge to be in every one in a State of Nature. Therefore, at the institution of the civil state, it consequently passed by necessary and tacit implication to the magistrate, who is armed with the strength of the whole body; so that there is no occasion to suppose a formal and actual transfer.

Thus it appears in cases of murder, which admit of no reparation, the magistrate may lawfully inflict death, from the apparent justice and necessity of his exercising such power for the common good; and his right is nothing more than the common right of vengeance, which every one had against the perpetrator of the inextinguishable crime of murder.

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Lord *Hale* seems to admit, that in case of murder, the Law of retaliation was *juris naturalis*; and that in other cases the *lex talionis* was *juris positivi*. Of all other crimes, as has been observed, the party injured might obtain a recompence, and security might be had for the future; but in case of murder, no reparation can be made to the injured, and the survivors can have no security but the death of the delinquent.

The magistrate, then, having a right to inflict death in case of murder, as being an inextinguishable crime, let us examine whether there is a necessity of extending capital punishments to other cases.

CHAP. V.

SECT. I.

Of the Necessity of inflicting Capital Punishments.

MANY urge the necessity of sanguinary Laws, and plead the original consent of mankind to their institution, with their implied and tacit consent to their continuance. But these pleas do not prove them to be either just or expedient.

How many savage and absurd customs, which prejudice once idolized as sacred, are now happily abolished? Such is the inveteracy of habit, that it will give a sanction to the most unnatural and horrid practices. We read of *Indian* nations who used to feast on the bodies of their deceased relations. When *Darius* asked these savages,

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savages, on what condition they would consent to burn their dead, after the *Grecian* fashion; they assured him that no inducement whatever could prevail on them to adopt such a practice. When, in like manner, he demanded of the *Grecians*, on what terms they would agree to feed on their deceased friends, after the *Indian* custom; they received his proposition with horror,

It was thought necessary among our rude *German* forefathers, to sacrifice captives taken in war; and general assent gave a sanction to the inhuman custom. But the present age is too polished and refined, not to hold this savage practice in abhorrence.

We need not, however, resort to such distant instances to prove the triumph of custom over reason and humanity. Scarce two centuries have elapsed, since, under the establishment of Law, and the sanction of Religion, a practice prevailed in this country, of burning those brave but unfortunate

Martyrs

Martyrs to opinion, whom the interested persecutions of popish bigots marked out for sacrifice under the name of *Heretics*. Nay, it was no longer since than the 29 Car. II. (not one hundred years ago) when the last badge of religious persecution in this country, the writ *de Hæretico comburendo*, was abolished; but the practice of burning heretics still prevails in those countries where religion is impiously perverted to blind the understanding, and to harden the hearts of its votaries against their fellow-creatures.

These absurd, unnatural and brutal practices are, however, justified on the footing of necessity, and in many places have obtained general assent, and received the sanction of Law. But no necessity, no general assent is of force against the Law of Nature. There are immutable and eternal relations of things antecedent to all human institutions, which fix such certain boundaries to right and wrong as no Laws whatever can either limit or extend.

The violation of Law, says *Gordon*, does not constitute a crime where the Law is bad,
but

but the violation of what ought to be Law is a crime even where there is no Law. The essence of right and wrong does not depend on words and clauses inserted in a code or statute-book, much less upon the conclusions and explications of lawyers, but upon reason, and the nature of things antecedent to all Laws. In all countries, Reason is, or ought to be, consulted before Laws are enacted; and Laws had better to have never been made where it is not consulted. Reason is, in some degree, given to all men; and *Cicero* says, whoever has Reason has right Reason; that Virtue is but perfect Reason; and that all nations having Reason for their guide, all nations are capable of arriving at Virtue.

Laws therefore must be founded on Reason, otherwise they are usurpations on the natural rights of mankind: and no general assent, or supposed necessity, can give them that validity which they do not derive from their own justice and expedience.

An obligation from one individual to another to do an illegal or immoral act, by
the

the Law of the land is void in itself: and by the same reason all obligations to public Laws are void, when they are repugnant to the unalterable principles of right reason and moral virtue.

S E C T, II.

The same Subject continued.

FARTHER, with respect to the necessity which is the grand argument for Capital Punishments, it may be observed from experience, that what was, and in some places still is, deemed necessary, has among us been found to be inexpedient and inhuman; and we perceive that the abolition of such barbarous customs is attended with no inconvenience, but, on the contrary, productive of infinite improvement.

In truth, we are apt to be swayed too much by political maxims, and the pretended necessity of things: there are many principles in the administration of government

ment inconsistent with right reason and strict justice, which political casuists attempt to vindicate by the general plea of necessity, and by making subtle and extravagant distinctions between political and moral virtue, which have no real foundation in nature.

The bulk of the people, from their indolence and incapacity, judge every model to be perfect to which they are accustomed; and think whatever is, is necessary to be done. They are enemies to innovations, because they are too short-sighted to perceive the good which may result, or too inert to oppose the inconveniencies which may ensue, from a change.

How many revolutions have taken place, by which society has been improved, which, when they were first in agitation, were deemed *Utopian* and chimerical? How many projectors have been deemed mad and foolish, because their countrymen were blind and obstinate? What violent oppositions have been made in this kingdom to many new regulations,

regulations, which, upon experience, have proved of such uncommon utility, that their most eager opponents have at length petitioned to be made partakers of what, through ignorance and pertinacity, they had before strenuously rejected.

Though the state of society, especially in this kingdom, is greatly improved, there is still room for farther amendment; and we are yet many removes from the perfection we are capable of attaining.

S E C T. III.

Farther Continuation of this Subject.

NOLUMUS *leges Anglie mutari*, was the answer of the Earls and Barons at the famous Parliament of *Merton*, where the Prelates endeavoured to procure an act to alter the Common Law, and substitute the Civil and Canon Law in its stead.

This answer, though extremely spirited and pertinent at that time, has been since
quoted

quoted with great impropriety by those who have opposed new institutions. Many obstinately persevere in a beaten tract, though rugged and unpleasant, rather than deviate into an untrodden path, however smooth and inviting.

There are certain aphorisms, which men of weak minds or interested views are always ready to apply for want of solid reasons to support their objections. When any scheme of improvement is offered, hundreds will tell you, that *innovations are dangerous*, for one who is capable of pointing out where the apprehended danger lies.

Should this maxim prevail in the extent to which some are desirous to stretch it, our laws would become, like those of some eastern nations we read of, immutable. But innovations are then only dangerous, when they are not founded on reason and justice, and when they are not introduced at a proper time and with suitable caution.

If we are deterred from attempting innovations, for fear of some uncertain danger

in the experiment, we must be content to labour under all the mischiefs and inconveniencies, which time, and a change of circumstances, brings on almost every institution, however expedient and unexceptionable at its original establishment. As circumstances vary, policy should undoubtedly accommodate its system to such a variation.

However political casuists may pride themselves in subtilizing and reconciling moral repugnances with public necessity, we may venture to conclude, that whatever shocks the common sense and feelings of mankind, is faulty in its original establishment.

Nothing can be more opposite to natural reason, than the confounding the different degrees of crimes, and with indiscriminate severity inflicting capital punishments on unequal offences.

To imagine that such rigour will deter delinquents from offending, is a vain supposition.

position. The dread of future punishment, however formidable and inevitable too, (though it is seldom that offenders think punishment unavoidable) makes but inadequate and impotent impressions on a man, while under the present predominancy of an impetuous passion; as is notorious from the very slender effects of religious fears on true believers.

S E C T. IV.

Consideration of Authorities on this Subject.

A System of government, founded on, or supported by, the necessity of inflicting Capital Punishments with such indiscriminate severity, must be established against the fundamental principles of the Law of Nature and Right Reason, which forbids us to take away life unless to save our own, or avenge the death of another. But happily such necessity seems to be, in our free constitution, purely imaginary.

Lord

Lord *Hale*, whose opinion deserves to be highly respected, is, it must be confessed, an advocate for this necessity. "Although, he observes, many schoolmen and canonists are of opinion, that death ought not to be inflicted for theft, yet the necessity of the peace and well ordering of the kingdom hath, in all ages and in almost all countries, prevailed against that opinion, and annexed death as the punishment of theft." And in further support of this necessity, his lordship refers to *Covarruvias*, where, he tells us, this case is learnedly disputed.

Upon consulting *Covarruvias*, his opinion appears to be, that thefts should be punished capitally, where they are flagrant either in quantity or quality: and his reason is, "because men make a jest of lighter punishments."

Here it is to be observed, that the rule of punishment, according to the reasoning of *Covarruvias*, is to be regulated by the measure of distributive justice; and the punishment to be either capital or not,

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according

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according to the quantity or quality of the theft.

But the crime of theft, considered abstractedly and by itself, does not admit of any distinction of punishment; for though with regard to the party robbed, the theft is more or less grievous, according to the quantity or quality of it; yet, with respect to society, the bad tendency of it is equally the same, and the crime equally flagrant.

Upon this principle *Plato* framed his Laws, when he ordained that, If any one was guilty of public theft, whether it was of great or little value, he should incur the same penalty; for that he who took a thing of trifling value, shewed the same disposition to theft, as he who stole things of greater value.

This Law of *Plato's* is agreeable to reason. For the Law should never make a distinction between crimes of the same species, though particular circumstances attending the criminal act, may be a foundation

tion for the magistrate to extend mercy to the delinquent.

But as *Covarruvias* is of opinion, that the rule of distributive justice should be observed in different species or degrees of the same crime, why, it may be asked, should not the same measure of distributive justice be maintained between one crime and another? And why should theft be punished with the same capital rigour as murder? Perhaps the best answer that can be given, is that of *Draco's* above quoted.

To argue for the necessity of inflicting death, upon this foundation, "that men make a jest of lighter punishments," is to reason upon a principle which may be carried farther than those who advance it perhaps foresee, or would wish it to extend.

It will not be denied, that there are many slight crimes which merit only light punishments, and to those who make a jest of them they are certainly no punishments.

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But because they lose their effect and become the jest of offenders, will it be said, that therefore their severity must be increased? Is it not obvious, that if punishments are to be increased on this account, they may be aggravated till all slight crimes are made capital? Such a system of legislation as this reasoning tends to establish, would indeed breathe the true spirit of *Draco's laws*.

Besides, in truth, it is not the nature or degree of punishment, which makes it either a jest or a terror; but the nature or disposition of the sufferer. Many delinquents make a jest of capital punishments, and smile at axes and gibbets; while to others, the shame of public reprehension only, is worse than death.

Admitting, however, that the terror of capital punishments had the same effect on all, yet it is against the Law of Nature to inflict death for the prevention of crimes of lesser degree than murder.

As the Annotator on Lord Chief Justice *Hale* observes, not only Schoolmen and Canonists were of opinion, that death ought not to be inflicted on theft, but it was likewise the sense both of the *Jewish* and *Roman* Laws; and though, as his Lordship says, the principal end of punishment is to deter men from offending, yet it will not follow from thence, that it is lawful to deter them at any rate and by any means.

Obedience even to just laws may be enforced by unlawful methods. *Est pœne modus, sicut rerum reliquarum*, says *Cicero*, in his Epistle to *Brutus*. And again, in his first book of Offices, *Est enim ulciscendi & puniendi modus*.

But, in truth, experience evidently teaches us, that capital punishments do not answer the end proposed. And many among the best and wisest men have recommended lenity and moderation in punishments; and such systems have been

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found to make the most orderly and well-disposed Citizens.

Grotius strongly recommends it to all Christian princes, to copy the example of *Sabaco* king of *Egypt*, a prince of most distinguished piety, who, as *Diodorus* tells us, changed capital punishments, with good success, into stated kind of labour: And indeed we learn from history, that the nations, whose civil institutions have been most applauded, have not punished theft capitally.

Quintilian very justly remarks, that no one will doubt, but that if it is possible to reclaim the guilty, as it is allowed to be sometimes possible, it is much better for the commonwealth to spare their lives than to punish them capitally.

We may readily admit, that the true measure of human punishment should be governed by the general interest of the state; but we may safely deny that the
interest

interest of any free and well regulated state requires capital punishment to be inflicted, except in a case where the safety of the state demands it. And we contend, that there are more effectual methods of police, by which criminals may be amended themselves, make reparation to the injured, and by their punishments become a living and daily example to others.

In this country we have never known, that any addition to the severity of punishments has had the intended effect of checking the progress of these crimes against which they were directed. We have at this time a remarkable instance to the contrary, in the act of parliament for the more speedy execution of criminals in cases of murder, and for anatomizing their bodies after execution.

This Law was no doubt well intended, and had a strong appearance of answering the good end for which it was calculated.

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Nevertheless experience has proved its inefficacy; for the number of murders has rather increased than diminished since the passing of that act.

It must then be admitted, that the severity of punishments does not lessen the number of criminals; and such rigour is more particularly inexpedient in our free constitution, in which the Judge, in capital cases, must pronounce the sentence of the Law, and the sovereign has no power to alter it, though he may remit it by pardoning the offender. So that the excessive rigour of the Law produces this dilemma, that a criminal must remain totally unpunished, or undergo a sentence too grievous and severe for the offence.

The arguments of the old writers, and some of later date, such as *Grotius* and *Puffendorf*, &c. cannot, as has been observed, be applied to our constitution. Their reasoning is calculated for the meridian of those governments, where the sovereign might alter, dispense with, or

mitigate the Law at pleasure. But in our constitution there is no medium, in capital cases, between severity and impunity.

It has been remarked, that the writers above-mentioned recommend lenity and moderation in punishments, though they, and in particular *Puffendorf*, declare their opinion, that it is not unlawful to inflict capital punishments in cases of theft, &c. for the public good.

But, in truth, severity in punishment cannot tend to the public good, unless such severity is warranted by the Law of Nature, to which all human laws and sentences should be referred. The subtle distinctions which philosophers and politicians have established between moral and political good, has been productive of, and applied to justify the most unnatural instances of cruelty and injustice. It is a distinction founded on the vanity and arrogance of men bewildered in speculation, who have proudly erected a system of their own, in opposition to that of Nature and Reason.

A system

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A system which ambition finds its interest in supporting against the common sense and undoubted rights of mankind.

To this dangerous refinement, however, we may oppose the authority of the poet,

Nunquam aliud natura, aliud sapientia dicit.

JUVENAL.

And we may venture to say, that a police founded on the unnatural principles of such a distinction, is a monstrous superstructure.

CHAP. VI.

SECT. I.

*Of the Causes which have produced
the Severity of Punishments.*

IF we enter into an accurate and political investigation of the causes which gave rise to the excessive rigour of Punishments, we shall be more clearly convinced that
their

their hard nature is unsuitable to our moderate and free constitution.

This examination likewise will lead us to account for the errors of those writers, who argue in support of such rigour, as essential to the public good. Insensibly biassed by the prejudice of education, and blinded by the habitude of living under partial constitutions, where the interest of the *governing* was mistaken for the public good, they framed their notions accordingly, and thought every severity lawful which tended to support and establish the ambition and avarice of the rulers over their oppressed and injured subjects.

It is not from the ignorance of legislators, that good and equal laws are not instituted. But it arises from wilful errors in the original frame of political constitutions, or to accidental revolutions, which set up and establish an interest in the governing, superior to, and distinct from, the interest of the governed.

At

At the first institution of civil governments, whether they are supposed to be established by usurpation or compact; that is, in other words, whether they are despotic, or comparatively free; the interest of the rulers has been the first, or at least too much the principal, object of consideration. If they are established by the first method, the usurper maintains by terror what he acquired by force: and thus fear, as *Montesquieu* observes, is the principle of despotism. If they are founded by the second method, the people are too apt to compliment the magistrate in whom they confide, with too much power and influence.

As it is the nature of power to be encroaching, the rulers watch every opportunity and take advantage of every revolution to extend their sway. Encroachments of this nature sometimes pass in silence; nay they are frequently countenanced by the public voice of a biassed or deluded multitude, till at length they are claimed as prerogatives, and confirmed as parts of the constitution,

constitution, under the sanction of severe penalties: And as, in such partial and ill constituted states, it is not so much their concern to prevent and reform as to punish, so the severity of the Laws holds an equal and rigorous measure throughout the various modes of transgression.

Such governments seem to be founded on the reasoning of *Thrasymachus* in *Plato's* Republic, who there defines justice to be "That which is for the interest of the superior." And adds, that the greatest injustice is productive of the greatest happiness, as in the case of perfect tyranny.

When such a system however is once established, many causes contribute to its support: The prejudice of education influences many to think that those regulations must be just and expedient, which their grandfathers agreed to, and their fathers approved: The timidity of others and their indifference to public concerns, makes them tacitly acquiesce under institutions which their judgment condemns. Men of
mild

mild and philosophic dispositions cultivate the arts and sciences, and leave the wheels of government to the rotation of Chance; and the ambition and avarice of another class make it their interest to uphold such a partial system, which affords them a dangerous scope of acting as public robbers, petty tyrants, plunderers, and extortioners.

As in all governments of this kind the principal end of policy is to support this unequal and injurious system, and as every thing which tends to that end is honoured with the name of political virtue, and zeal for the public good; therefore little care is taken of the morals of the people, and where they are depraved, no endeavours are used for their reformation; but they are doomed to death for expiable crimes, in order to save the legislator the trouble of redressing such private evils, which are in truth the true public concern, that they may be more at leisure to provide for, what they call, the Public Good, which is in fact nothing but the interest of a few.

Thus the unhappy wretches, whom poverty or habitual depravity have instigated to the commission of capital offences, fall deplorable victims to the severity of laws instituted by injustice and usurpation, upheld by ignorance, inattention, and interest, and sanctified by custom.

Legislators, however, ought to prescribe laws not merely from mechanical habit, but from rational principles. Their design ought to be to rectify the dispositions of mankind, and make them in love with justice; and this ought more particularly to be the intention of the laws in our happy constitution, as, since the revolution especially, it really has the public good for its object, which in most other governments is only a pretence.

There is yet another cause too, which has contributed to the severity of punishments, and which arises from a mistaken, though perhaps a laudable principle, that is, the effect of passion in the legislature.

S E C T. II.

Of the Effects of Passion in the Legislature.

PERHAPS the great severity of our Laws has been in some degree owing to their having been made *flagrante ira*, on some sudden occasion, when a combination of atrocious circumstances, attending some particular offence, inflamed the legislature.

Men in the warmth of resentment, naturally endeavour to inflict those penalties on delinquents which are most terrible to their own imaginations; and as nothing is more terrible than death to those who possess ease and affluence, they therefore deem Capital Punishments to be universally the strongest objects of terror.

But it is wrong, in such cases, to judge from our own feelings, unless we could put ourselves in the place of the criminals who
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are the objects of our consideration. Men, who are capitally guilty, are such as are generally tired of life in the manner they hold it; and who therefore commit crimes to better their condition, or put an end to their being. They generally make their advances to the wickedness they intend to perpetrate, with the view of this alternative before their eyes; and consequently the terror of death hath not sufficient influence to deter them from their *desperate resolution*.

Shakespeare, that excellent judge of human nature, describes the situation of such wretches in the following speeches of the two murderers in *Macbeth*. The first says,

I am one
Whom the vile blows and buffets of the world
Have so incensed, that I am reckless what
I do, to spite the world. —

The second adds,

And I, another,
So weary with disasters, tugg'd with fortune,
That I would set my life on any chance,
To mend it, or be rid on't.

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Again,

Again, in his Play of *Measure for Measure*, he has represented the hardened criminal, as "a man that apprehends death no more dreadfully than as a drunken sleep; careless, reckless, and fearless of what is past, present, and to come; insensible of mortality, and mortally desperate." It is well observed by the Author of *Principles of Penal Law*, that the crimes of such a man may perhaps have made him unfit to live, but he is certainly unfit to die. The safety of the community, and the preservation of individuals, may call for his execution; but the bosom of Humanity will heave in agony at the idea, the eye of Religion will turn with horror from the spectacle.

We learn from experience, that, in those countries where punishments are mild, the minds of the people are more affected by them, than they are in other places by more severe ones *. This lesson alone is

* L'experience fait remarquer, que dans les pays ou les peines sont douces, l'Esprit de Citoyen en est frappé, come il' est ailleurs par les grandes.

L' Esprit de Loix.

sufficient

sufficient to teach us, that we gain no other end by the severity of punishments, than that of hardening the minds of the people, and adding desperation to depravity.

But in order to prove more effectually that rigorous and sanguinary laws are inconsistent with our free and moderate constitution, it will be proper to take a view of our Criminal Laws in all their different relations.

CH A P. VII.

S E C T. I.

Of the different Relations of our Criminal Laws.

THE Baron de Montesquieu observes, that all laws should be relative to the principles of the government, to the nature of the climate, to the morals, manners, and religion of the people; and,

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lastly,

lastly, to the number of inhabitants. Let us therefore proceed to examine our Criminal Laws in these various respects.

SECT. II.

Of Criminal Laws with relation to the Principles of our Government.

THAT all Laws should be framed correspondent with the Principles of the Government where they are obligatory, is a political axiom not to be controverted. Severe Laws, it will be allowed, are best calculated for the support of despotic power; but moderate Governments are to be maintained by a milder system.

It would be easy to prove, says the writer above quoted, that in all, or most of the states in *Europe*, the rigour of punishment has diminished, or augmented,

in proportion as they approached towards, or deviated from, Liberty †.

The truth of this proposition may be illustrated by various instances drawn from history. It has been remarked by the *Chinese* writers, that, on the eve of a revolution, there was always a great increase of rigorous punishments; and that a corruption of morals kept pace with their progressive severity.

This truth may be farther exemplified, by taking a short review of the *Athenian* Government. To search for the author of every successive change in the frame of their laws, would be an obscure and endless enquiry. It will be sufficient that their rigour was mitigated in proportion as Liberty gained strength and ascendancy.

† Il seroit aisé de prouver que dans tous ou presque tous les états d'Europe, les peines ont diminué, a mesure qu'on s'est plus approché, ou plus éloigné de la Liberté.

L'Esprit de Loix.

It is well known, that *Draco* the Archon, in the thirty-ninth Olympiad, punished almost every trivial offence with death. They who were convicted of idleness, or who stole an apple, were doomed to suffer the same fate with criminals who committed murder or sacrilege. Therefore *Demades* is remarked for having said, that *Draco*'s laws were not written with ink but blood, And *Draco* himself being asked, why he made death the punishment of most crimes, gave the answer before alluded to, "Small crimes deserve it, and I have no higher for the greatest." During his Archonship the people groaned under tyranny and oppression.

But, in the forty-sixth Olympiad, *Solon* being Archon, he repealed all those bloody Laws, except that only which concerned murder. This wise legislator endeavoured to rescue the people from the burden of oppression, and laboured to correct the abuses in government, by reforming the manners of the people, which is the only effectual method.

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He introduced such a mild system of Government, and established such a prudent equality, that though the executive power and magistracy continued in the hands of great men, yet the inferior people were secured from oppression, and admitted to some share in the Government.

Though *Solon*, however, used the precaution of making the Senate take a solemn oath to preserve the laws, yet his care was not sufficient to secure them from the innovations of lawless and ambitious men.

Some time after, the tyrant *Pyfistratus* deprived the *Athenians* of their liberty, and though he himself and his son, as *Plutarch* informs us, did in a great measure adhere to *Solon's* institutions, yet they did not follow them as laws, but observed them as wise and prudent counsels, from which they departed whenever they found them to interfere with their interest or inclination.

This tyrant's family being expelled, *Solon's* institutions were restored by *Clythe-nes*; but they were afterwards violated when tyranny again reared its head, and the form of the Government was changed, first by the Four Hundred, and then by the Thirty.

In these several revolutions, usurpation was supported by severity. Mild laws were changed for more sanguinary institutions; and the people who opposed such tyranny, were dispatched out of the way, while they who acquiesced, were enslaved.

It was under the usurpation of the Thirty, that an attempt, as *Plato* tells us, was made to put a Citizen to death unjustly, which *Socrates* opposed, and thereby drew their hatred upon him. Their Government was so cruel and tyrannical, that *Plato*, who was then a young man, being invited to take a share in the administration, declined it, though many of them were his friends and relations.

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The same observations will hold good with respect to the *Roman* Government. In the days of their freedom, their Laws were mild, and their morals pure; but when tyranny and usurpation lorded it over their liberties, then the Laws became sanguinary, and the people corrupt. Offences multiplied with penalties, and severity having a natural tendency to debase the mind, it consequently destroyed the dignity of Virtue.

The Laws, as *Montesquieu* observes, during the reigns of their Kings, being instituted for a people composed of fugitives, slaves, and plunderers, were uncommonly severe. Had the Decemvirs consulted the true spirit of the Commonwealth, they had not given place to those Laws in their Twelve Tables; but as they entertained views of tyranny, they had no intention of acting with a spirit agreeable to the constitution.

The arbitrary design of the Decemvirs was evident, from the capital punishments they decreed against the authors of satirical pieces,

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pieces, which were quite opposite to the spirit of a Republic. But men, who intended to subvert public liberty, were afraid of writings which might rouse the spirit of Freedom.

After the expulsion of the Decemvirs, all the Penal Laws which they had enacted were in fact abrogated. They were not, it is true, repealed in form; but the *Lex Portia*, by which, as *Livy* tells us, it was ordained, that no *Roman* Citizen should be beaten or put to death, rendered them entirely useless.

Livy's remark on the *Romans* was, about this time, strictly true: for no people ever shewed greater moderation in punishments.

If, besides the lenity of punishments, we consider the right which the accused had of going away before judgment, we shall find, that the *Roman* Laws were strictly conformable to the spirit of Freedom.

Sylla, who confounded tyranny, anarchy, and liberty together, seemed, by his Institutions,

tutions, to generate Crimes. Among other things, it was forbidden by the *Lex Cornelia*, that any person should endeavour to ingratiate himself with the army, so as to dispose them towards serving his particular interest, which was nothing more than laying a snare for cutting off any commander who should prove obnoxious to the tyrant.

All *Sylla's* punishments ordained the interdiction of fire and water; to which *Cesar* added the confiscation of the delinquent's goods; since the rich, preserving their estates in their exile, were less cautious of committing Crimes.

Let us, however, compare the Laws of *Rome* under a Commonwealth, with those in force under the *Cesars*, when even the mild *Augustus* made it treasonable to be the author of Lampoons and Pasquinades, tho' levelled at private persons.

As *Gordon*, in his Discourses on *Tacitus*, takes notice, *Augustus*, in this provision, consulted his own security, without seeming to

to do so. He found his own sanctuary in providing one for others; and regulations made for his own defence and gratification, had the appearance of a spirit altogether public and disinterested: for, if contumelies cast upon private persons were high-treason, what must it be to meddle with the Prince or his Administration?

In the time of *Augustus*, he who exposed the gallantries of a Lady of Quality, or the foibles of a Patrician, was deemed to bear hostile purposes against the Commonwealth; nay, every adulterer was adjudged a traitor.

How the severity of the Laws was increased by *Tiberius*, and some of the succeeding Emperors, is too well known to need any animadversion: they who are acquainted with history, know the corruption they occasioned, and that, at length, they involved both the rulers and the governed in one common ruin.

It is observable, that in this kingdom the severity of our Laws has been chiefly extended

tended under the reigns of the most arbitrary of our ancient kings. By the common Law of *England*, there were few cases in which offenders were not allowed Benefit of Clergy. It was denied only in treason, petit treason, and sacrilege; and even in sacrilege, the Ordinary might have allowed it, if he pleased.

While the feudal system remained in its full vigour, even murder was not punished capitally; but the murderer was compelled to make composition with the relation of the party slain, paying a sum, rated according to the rank of the person killed, besides a fine to the Lord.

The reason why murder was not then capital, seems to have been, because their notions were at that time too crude to consider the crime as an injury to the State; they considered it only a prejudice to the relations of the party, and to the Lord; and the composition and fine were thought compensations to them for the loss of a kinsman and vassal. They had no idea of the

the injury done to Government, by disturbing the peace, and endangering the safety of Society. Public Good was then so imperfectly understood, that Crimes were considered in no other light than as they affected the injured individuals, and those with whom they were immediately connected.

Besides, as the greatest part of the nation was then martial, and might be deemed as one continued encampment, every man was considered in a capacity to defend himself, and it was thought unnecessary, and perhaps impolitic, to afford him that protection from the Laws, which he ought to derive from his own vigilance and valour.

But, as policy grew more refined, they began to conceive the idea of a Crime against the State, and then ordained a fine to be paid to the public Fisk likewise. At length, they discovered the necessity of taking away the right of private revenge from individuals, and putting it into the hands of the Magistrates. Having attained this degree of improvement, it becomes the

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care of the legislature to direct this power over the lives of the subjects, in a manner most agreeable to the state of civilized refinement.

It is remarkable, that the first who restrained the Benefit of the Clergy was *Henry VII.* a politic and ambitious Prince, who supported a precarious title by rigorous institutions; and by later statutes it is entirely taken away, in a multitude of offences. But what appears most extraordinary and unaccountable is, that the greatest part of the Crimes for which offenders are excluded from their Clergy, have been declared capital since the Revolution.

If the proposition above quoted is true, "That in all or most countries of *Europe* the rigour of punishments has diminished or augmented in proportion as they approached towards, or deviated from, Liberty;" then how shall we reconcile the practice, since the Revolution, with the principles of the constitution?

It is well known, that at the Revolution the plan of Liberty was extended, and our religious and civil Rights at that time received confirmation and enlargement. Here then, one might conclude, there was room for a milder system of Government.

Nevertheless we find, that the sum of capital punishments has been considerably augmented since that happy period: and there must certainly be an error in legislation, when Laws are enacted against the principles of the constitution.

The ruling principle of Government in this kingdom is allowed to be Liberty; but our Criminal Laws seem rather calculated to keep slaves in awe, than to govern freemen. They seem to contradict all notions of justice, and confound all distinctions of morality. By the ignominy they impose in many cases, they bend the mind to the lowest state of servitude: by the rigour they indiscriminately inflict, they adopt the principles of despotism, and make fear the motive of obedience.

Despotism

Despotism itself may, indeed, teach us milder institutions; for we are told, that in *Russia*, during the reigns of the late Empress *Elizabeth*, and the present Empress *Catherine* the Second, no malefactors have been put to death.

Like bad masters, who are readier to chastise than instruct their scholars, we have adapted our Laws rather to punish delinquents than to prevent crimes. But such Laws are so far from having a tendency to reform the morals of the people, that, by exposing them to ruin and ignominy for slight offences, they are rendered desperate in their fortunes, and totally lost to all sense of shame. Their punishment serves only to prepare them for greater crimes, till, at length, they are sent out of the world by the hands of the executioner, when, by the wisdom of the legislature, they might have lived for the benefit of society.

It may be affirmed, that were the injured themselves to be intrusted with the right of revenge, their sentence would not,

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in general, be so rigorous as that of the Law; for few men in the present civilized state have that violent resentment against many offences which the Law has express, and we find that they rather suffer crimes to go unpunished than to be the instruments of punishing them too severely.

Thus, by impunity, wicked men are confirmed in the habitude of evil, till they become totally corrupt and abandoned; and thus the laws counteract their own end. They tend to corrupt rather than reform the morals of the people: they are repugnant to the dictates of reason and justice; and diametrically opposite to the principles of our constitution. Let us now see whether they correspond with the nature of the climate.

S E C T.

S E C T. III.

Of Criminal Laws in relation to the Climate.

IF the dominion of the Climate, as *Montesquieu* affirms, is the most sovereign of all dominions, we may venture to assert, that our Laws in criminal cases are by no means calculated to correct the vices of the Climate.

It is notorious even to a proverb, that the Climate of this country is such as subjects the natives to a gloom and melancholy, which renders them restless in their condition, and dissatisfied with their very being: so many destroy themselves even in the lap of good fortune, that the crime of suicide is deemed to be the natural growth of our soil.

How impolitic therefore is it to make capital punishments so frequent, among people who have so little dread of dissolution, and among whom natural causes are

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supposed to concur to occasion a *tedium*
vita?

The terror of death can have little influence over their minds, who are destitute of those requisites, which in their apprehension give a relish to existence; and it is no wonder that they hold life cheap, who want those enjoyments; when many, who are blest with all that fortune can bestow to render life agreeable, do not think it worth their preserving.

Such sanguinary Laws, instead of correcting, serve only to increase this vice of the Climate. This is so obvious, that, without farther animadversion, we pass on to the next head of consideration.

C H A P.

C H A P. VIII.

S E C T. I.

Of Laws with reference to Morals.

IN treating of Laws as relative to Morality, we must consider, 1. How Laws contribute to form the Morals of the people. 2. How the state of Morals tend to influence legislation. Laws should sometimes lead, and sometimes follow. They may, at one time, be made instrumental towards forming good morals, and at other seasons they must bend to the habits of the times.

S E C T. II.

How Laws contribute to form Morals.

LAWS may insensibly lead people to the practice of Moral Virtue, by establishing such fixed principles, prescribing

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such rules of action, and instituting such modes of government, as will necessarily give a bias to the minds of the people, and of course ultimately affect their Morals.

The greater degree of independence which the laws establish, the more generous and ennobled will be the sentiments of the people. From that generosity many moral virtues will take their rise, though many political inconveniences may occasionally ensue from it.

That freedom and elevation of sentiment which accompanies independence, is attended with a consciousness of importance, and a decent pride, which will not stoop to base and sordid practices. It contributes to render men just, benevolent, and grateful. If they are rendered haughty by their independence, and too scrupulous in exacting respect, they will make ample returns in civility and integrity. They will display a bold and manly spirit even in their vices, which will not be of a sordid or selfish nature.

As the Laws degenerate from those principles of liberty, the people will become mean and abject. Being held in little estimation in the state, they will not know how to set a just value on themselves. Instead of being governed by a sense of honour, they will be kept in awe by a dread of punishment. They will not scruple to commit any act of baseness or injustice, which they can perpetrate with the prospect of escaping detection. They will be subtle, fraudulent, and malicious. They will be more prone to revenge than to resentment; that is, they will be slow in expressing their sense of injury, but will secretly contrive to take vengeance, before they shew that they have been offended.

S E C T. III.

How the state of Morals should influence Legislation.

AS corruption will by degrees infect the soundest constitution, and depravity taint the purest morals, so Laws must

sometimes be accommodated to the fluctuating state of moral virtue.

Where public Morals are pure and untainted, the Laws should be simple and moderate ; such as they were in the early times of *Greece* and *Rome*, when many offences were unknown which afterwards became capital.

But when, from the intoxication of some extraordinary success, or the consequence of sudden affluence, or any other cause whatever, the public Morals become tainted and depraved, the legislature should proceed with greater rigour against delinquents.

Yet, even in the most corrupt state of moral virtue, capital punishments seem to be ineffectual remedies against the general depravity. They remove a criminal from society, but do not prevent the crime.

All punishments should, if possible, be not only *in terrorem aliorum*, but *in emendationem delinquentis*. Such as are capital, however,

however, do not answer either one end or the other. They destroy the offender, and his fate is soon forgotten by the criminals who survive him. Nay, the impression of terror is so slight on the minds of many, that, even during the time of execution, they are not afraid to perpetrate the very crimes for which the sufferer is expiring before their eyes.

Therefore, the great stress which has been laid on the advantages of public executions, seems to rest on a weak foundation; for they who are endued with a great degree of sensibility, will not behold them; and hardened offenders view them without being affected by them.

It is true, when any particular species of delinquency is grown common and enormous, extending the punishment of it to death may, at first, strike the offender's imagination, and perhaps cause some little suspension of the criminal practice; but the wicked soon grow familiar with terror, and when they have conquered their apprehensions,

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hensions, become more abandoned than ever.

Instances of this kind are not only frequent in our own, but in foreign countries. Robberies on the highway were common in some countries; highway-men were sentenced to the rack; this, says *Montesquieu*, checked their progress for a while, but the mischief soon returned with as much violence as ever.

It is said, that, in the Papal dominions, where all crimes, according to the spirit of Government, are punished capitally, that robberies and murders are remarkably frequent: Whereas, in *Tuscany*, which is divided from the Papal dominions but by a small ditch, travellers are secure; tho' death is there inflicted on no crimes whatever, except treason and some species of murder.

* Les vols sur le grands chemins étoient communes dans quelques états, on voulut les arreter, on inventa le supplice de la Roue, qui les suspendit pendant quelque tems. Depuis ce tems, on a volé comme auparavant sur les grands chemins. L'Esprit de Loix.

S E C T.

S E C T. IV.

Application of the foregoing Reflections to England.

SINCE Criminal Laws, therefore, ought not only to correspond with the state of public Morals, but may in fact themselves be made to contribute towards Morality, it may be worth our enquiry, to consider the state of Moral Virtue in this kingdom, and how far the frame of our Laws tends to encourage or improve it.

With respect to the present state of Morality, their opinion seems to be ill founded, who concur in censuring the depravity of the present age, and would induce a belief that we are more corrupt than our ancestors.

There are virtues amongst us, which would have reflected lustre on the brightest patterns

patterns of antiquity. The modes of virtue indeed are changed, but the essence is still the same. If we do not rival our forefathers in hospitality *, we exceed them in charity. If we are inferior to them in valour †, we surpass them in moderation. If they had in some instances more fortitude, we have more clemency.

The alteration which has taken place in the model of our constitution, and the manners of the people, render the exertion of many qualities impossible now, which, in former times, were deemed noble and virtuous.

* The ancient hospitality of our forefathers, so much applauded by some Authors, seems to have been a necessary consequence of the dependance of the Vassals on the Lords, according to the principles of the Feudal System. The great men were obliged to keep open house for their *Retainers*; but they to whom they thus extended their hospitality, cannot properly be considered as their *guests*.

† If it be objected, that valour does not come properly under the consideration of the state of Morals; it may be answered, that by valour, in this place, is meant, the spirit of public defence, which is a moral duty.

The

The increase of trade and commerce has lessened the number of those virtues, which are generally deemed great and heroic; and which most forcibly engage the attention, while at the same time they command the applause of the multitude. But a more gentle and amiable train have succeeded in their stead, which claim the approbation of the just, and the sanction of the wise.

The trading and commercial interests, by enlarging the wants of mankind, have diffused the principles of benevolence. If they have increased the love of wealth, they have extended the sway of justice. If they have advanced self-love, they have, with equal pace, promoted social union. Their influence evidently solves the paradox of the Poet, that *SELF-LOVE and social are the same*.

There is a tenderness and delicacy in the present state of moral virtue, which some have endeavoured to refine into self-love and pusillanimity.

Too many are inclined to think, that public virtue depends on a partial and blind attachment to a particular spot of the globe, and a certain race of beings called countrymen.—That magnanimity consists only in braving danger and setting death at defiance.—That to subdue the tender feelings of the heart, and the natural sensations, by a studied ferocity, is the test of fortitude. But there is a degree of delicacy, which, though censured by some, as bordering upon effeminacy, is not incompatible with real magnanimity. Men of stern looks and obdurate hearts, have not always firm minds. Upon this principle, however, they endeavour to give a disagreeable cast to the most amiable qualities which can adorn human nature. According to them, the benevolence of humanity, and the beneficence of charity, proceed from selfish motives, and are indications of natural weakness.

But however they may endeavour to debase the principle of self-love, it is nevertheless the foundation of Moral Virtue.

The man who has no regard for himself, will have little consideration for others. It is paying too great a compliment to Human Nature, to suppose, that even the motives of our best actions are so totally abstracted, as to exclude that all-ruling Principle.

The most noble, and, we may add, the most secret acts of generosity and humanity, are founded on the pleasing self-gratulation, which arises from a consciousness of having been the instrument of Good to others.

It does not, however, lessen the merit of humane and generous actions, to prove that we often promote the ease and benefit of others, to relieve ourselves from the pain with which their distress affects us.

When our sensations thus direct us to make the happiness of others a part of our own felicity, this mode of self-love rather

improves than derogates from the dignity of Human Nature*.

Self-Love is then only despicable when it prompts us to seek private enjoyment, independent of social connections, or at the expence of another's peace.

If the present age, therefore, is not conspicuous for those heroic qualities which raise vulgar admiration, it is distinguished

• The progress from *Self-Love* to *Social*, is most elegantly described by Mr. *Pope*, in the following lines:

“ God loves from whole to parts ; but human soul
Must rise from individual to the whole.
Self-Love but serves the virtuous mind to wake,
As a small pebble stirs the peaceful lake ;
The center mov'd, a circle straight succeeds,
Another still, and still another spreads ;
Friend, parent, neighbour, first it will embrace ;
His country next ; and next all human race :
Wide, and more wide ; the o'erflowings of the mind
Take ev'ry creature in, of ev'ry kind ;
Earth smiles around, with boundless bounty blest,
And Heav'n beholds its image in his breast.”

Pope's Essay on Man, Ep. iv. v. 361, & seq.

by many private virtues, which call for universal esteem.

We are not now in the days of our *Edwards* and *Henrys*, when the political system made military enthusiasm a necessary part of the national character. Among us it is sufficient to preserve the spirit of public defence, without making savage valour and unnatural ferocity a characteristical quality.

Whatever symptoms of softness and effeminacy may be discovered among the military part of the kingdom, while at home, within the happy abodes of peace and affluence, yet that they are not deficient in true national courage, every quarter of the globe can testify.

As there does not appear to be any foundation, therefore, for stigmatizing modern times with national effeminacy, neither is there any reason for accusing them of moral depravity.

Morality seems rather to improve than decline among us, and consequently there is less to be said in vindication of the rigorous system of our laws in criminal cases. Where moderate punishments are found ineffectual to restrain offenders, their inefficacy is generally owing to the indiction of the legislature, which has hardened the minds of the people by too great severity.

In remedying of evils, we too often fix our attention on the object to be redressed, without perceiving the inconveniences attending the remedy proposed. We do not reflect, that, in endeavouring to check the prevailing mischief by the severity of punishments, we at the same time debase the spirit, and consequently corrupt the Morals of the people by such rigorous extremes.

C H A P. IX.

S E C T. I.

Of Laws with reference to Manners.

THOUGH in point of Morality we may boast of a delicacy and refinement, which does honour to the age we live in, yet, with respect to our Manners; we cannot perhaps lay claim to any distinguishing excellence.

Though we have, in a great measure, worn off the reproach of our national character, yet we still continue reserved, morose, and gloomy, to a degree incompatible with social enjoyment. Though civilized, we are not refined: We are more courteous than polite, more gentle than affable.

The bulk of our people have more good-nature than good-breeding; they are ready to

do kind offices, but know not how to confer obligations with a becoming grace; their gifts lose their value by the awkwardness of the benefactor. They are more hearty than free; more sincere than sociable.

The liberty of our political constitution contributes greatly to occasion a disagreeable asperity of Manners. Proud of our freedom and independence, we are unwilling to acknowledge a superior. We submit to the rules of subordination with full acquiescence; and are more anxious to gain respect ourselves, than to pay it to others.

The sense of Liberty being early instilled into *Britons*, they naturally contract ideas of self-importance. They have none of that obsequiousness of address, that flattering assiduity, which distinguish people in less moderate Governments, where the distance of rank is observed with greater punctuality.

But

But we should not be ignorant, that there is a becoming medium between abject servility and fullen reserve. It is no doubt a detestable meanness to flatter vice, or sooth folly with supple condescension; but it is no way inconsistent with manly freedom, to treat our superiors with that respect and deference which the rules of political subordination require.

Though the excellence of our constitution favours political independence, yet there is a moral impossibility of establishing social independence. However, as Men we may be equal, yet as Citizens we must be mutually dependent.

Society must be supported by a reciprocal interchange of kind and agreeable offices; we should alternately serve each other with our power, and please each other by our complaisance.

There is a certain delicacy of Manners and complacency of behaviour, which preserves the decorum of society, and forms

the beauty of polished life. In this pleasing requisite, which our more courtly neighbours aptly call *bienfiance*, we are most of us greatly deficient.

The severe system of our Criminal Laws seems calculated to obstruct improvement in this particular; for the rigour they inflict, tends to render the public Manners more harsh and untractable.

This rashness of character, however, which is often the companion, and sometimes the mover of delinquency, may be softened and improved, by framing more mild and moderate institutions.

Mankind, under civilized governments, are not to be led by violence. The sense of shame, when used with caution and discretion, is a better instrument of government, than the dread of pain.

To suppose that the vulgar have no sense of shame, is a mistaken opinion, harshly conceived, and vainly adopted. The desire

of distinction, and dread of infamy, beat as strong in the breast of the Peasant, as of the Senator.

The essence of ambition and shame are alike in both. The modes vary according to the difference of education, and the accidental circumstances of birth and fortune. The honour of the Gentleman would be wounded by injuries of which the Peasant would be unsusceptible; and the latter would be sensible of reproaches, to which the former would be totally indifferent.

Should you put a negative on the Gentleman's veracity, he would think himself bound to revenge the indignity at the hazard of his life. The Peasant perhaps would smile at the imputation: But if you were to question his prowess, he would probably avenge the insult by immediate violence.

The former would be ashamed to be thought deficient in any of the modes of politeness, to which the latter is an entire stranger.

stranger. The latter, on the other hand, would blush at many indecorums which are familiar to the former. The sense of shame is predominant in each, but they are not agreed what actions are properly shameful. They correspond as to the principle, but differ in the application.

Nothing can be more unjust, than to condemn the common people, as too brutal to be governed by liberal notions, and fit only to be ruled by fear. Nature has made no distinction between them and the great. If there is any, it proceeds from secondary causes; causes created by injustice or inattention, and to be removed by equity and good policy.

By punishing slight offences with extraordinary rigour, we intire men to baseness, we plunge them at once into the sink of infamy and despair; from whence they never fail to rise Capital Criminals, often to the destruction of their fellow-creatures, and always to their own inevitable perdition.

We

We should not have such reason to complain of the vulgar, if we were more attentive to form proper regulations for their support and improvement in society. If we suffer them to be ill educated, and ill provided for, and then punish them for those very crimes to which their bad education and miserable condition exposed them; what is to be concluded from such a practice, but that we first make delinquents, and then punish them.

When we consider that the multitude whom we stigmatize as vulgar, form the far greatest part of society, our inattention with regard to their morals and manners, is the more astonishing and unpardonable,

As it must shock the delicacy and sensibility of a truly noble mind, to be of the same species with base and worthless creatures; one would imagine, that the pride of the great would make them industrious to humanize the vulgar, if the principles of policy and humanity did not direct them to that desirable end.

When

When we consider that the vices they are guilty of are often owing to their mean and necessitous condition of life, more than to the habitude of evil, we ought to apply our attention to prevent the effects, by removing the causes of their depravity,

S E C T. II.

How Manners are to be formed by Laws.

AS Laws should be accommodated to prevailing Manners, so public Manners are, in some degree, to be formed and regulated by political institutions. Such is the power of the Laws in this respect, that they are capable of giving an unnatural bias even to our most violent passions, and of making the most disagreeable and reproachful circumstances objects of honour and ambition.

Thus, among the Spartans, it was a grievous punishment to be deprived of the liberty

liberty of lending their wives. When we reflect on this prohibition with the feelings of a modern *European*, it shocks all our notions of connubial love and honour. We cannot conceive how it could be necessary to restrain men from doing an act which we deem so highly injurious to reputation, and destructive of peace. Much less can we imagine, that the legislature should intend the restriction by way of punishment, when it would be worse than death to us, were we obliged to do what the *Spartan* Law prohibits.

Jealousy must surely be a stranger to their bosoms, who could be mortified by such a prohibition. How slightly must they esteem conjugal fidelity, who took pride in permitting the abuses of the marriage-bed, which by our Laws, both divine and human, is held sacred and inviolable.

Such was the influence of the *Spartan* Laws, that they, in a great measure, rooted out the most violent passion of which human nature is susceptible. They occasioned
a total

a total perversion of the principles of pride and affection, by making it a circumstance of pleasure and ambition, to enjoy endearments in common, which, to possess entirely, is our greatest pride and delight.

It is well observed in *the Principles of Penal Law*, that *the idea of shame follows the finger of the law*.

As political institutions are found to have such extraordinary efficacy, there can be no doubt, but that public Manners are to be, in a great degree, fashioned and regulated by legislative policy. Every thing is, in fact, a punishment, which the legislature constitutes as such; and it is not the lenity of the Laws, but the impunity of crimes, which multiplies offenders.

The dread of shame may, in a great degree, be made to supply the terror of death, or of corporal pain. To many, the apprehensions of shame are more terrible than the approach of death; and several have parted with life to avoid disgrace.

It must be confessed, however, that there are some minds so extremely callous, as to be but little affected by infamy. Such unfeeling delinquents are to be restrained from evil by punishments which more immediately strike their senses.

As it is impossible, however, to adapt Laws to the various dispositions of offenders, and as many are dead to shame, therefore, besides the stigma of infamy, delinquents should be farther punished according to the different degrees of their crimes, by confinement and labour, which being the strongest and most universal objects of terror, are, consequently, the most effectual modes of punishment.

CHAP. X.

Of Laws, as relative to Religion.

RELIGION being the first and most important object of our concern, and the most powerful and binding obligation which enforces the duties of society, we ought

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ought to take uncommon care that our political institutions do not thwart or contradict the principles it inculcates.

As the Christian System is the most pure and perfect pattern whereby to frame our devotion towards the Supreme Being, it is the most excellent and amiable model whereby to regulate our conduct towards men.

The principles of Christianity breathe nothing but the most extensive benevolence, the most disinterested charity, and the most diffusive moderation. The Christian Religion abounds with precepts of forgiveness, brotherly love, and universal kindness towards our fellow-creatures; and, to use the words of Mr. Pope, our Religion

*Grasps the whole worlds of reason, life, and sense,
In one close system of benevolence.*

We are taught by our Religion a precept not to be found in ancient philosophy, *to love our enemies*. Our Liturgy frequently inculcates the duty of universal benevolence.

lence. The second prayer of the morning service begins with this address to our Creator, "Almighty God, who desirest not the death of a sinner, but rather that he may turn from his wickedness, and live."

What a different spirit breathes in our system of Criminal Laws? In their sanguinary complexion, we can trace but few marks of lenity. As in the highest and lowest offences, the Law makes no distinction of offenders; as in those extremes, none, by legal construction, can be accessories, but all are principals; so the same undistinguishing rule seems to be too prevalent in the punishments adjudged to intermediate crimes.

The most trivial delinquencies are ranked in an equal degree of guilt with the most enormous crimes. The pilfering pick-pocket, and the bloody murderer, however distant in point of criminality, are condemned and executed by one common sentence.

Instead

Instead of desiring to save the life of a sinner, that he may turn from his wickedness; our Laws cut him off in the blossom of his sins, and not only prevent the fruit of repentance, but render reparation impossible.

The sacred Law, however, teaches us milder institutions, and instructs us to proportion punishments to the different degrees of offence.

CHAP. XI.

*Of Laws with reference to the
Number of Inhabitants.*

THAT the strength of every commonwealth chiefly consists in the number of its inhabitants, is a truth universally assented to; and that the number of people in this island, far from attaining the increase which might have been expected, has, of late years, been rather thinned

thinned and diminished, is evident from the computations of very able calculators.

In such case therefore, our sanguinary Laws aggravate a political evil, which we ought rather to redress by every mild institution, and every species of encouragement which we can devise.

It ought to be the principal care of the magistrate to provide for the increase of population, and to employ the subjects to the best advantage, rather than to lessen their number by the hands of the executioner.

Does it repair the loss of the sufferer, does it reform the vicious, to execute criminals for petty and venial offences? By such policy, the individual wronged is not only left without any recompence for the injury sustained, but the injury done him is often farther aggravated by the expence of a prosecution; and society is prejudiced by the loss of a member, without reaping any benefit from the example of his fate.

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The strength of society, which consists in a numerous people, is impaired by capital punishments, and the moral principles of the community, which are the only foundation of lasting peace and prosperity, are not strengthened by their severity.

CHAP. XII.

Of the Disproportion of Criminal Laws.

NOT only the severity of our Criminal Laws, but their disproportion is the source of abundant mischief; and this disproportion may be viewed in two lights:

1. As it is established between public and private crimes.
2. As it is ordained between one private crime and another.

S E C T.

S E C T. I.

*Of the Disproportion between public
and private Crimes.*

NOTHING sooner contributes to deprave the morals of the people, than the little regard which the laws themselves pay to morality, by inflicting more severe punishments on offenders, who commit what are deemed Political Crimes, than on those who sin against religion and moral virtue.

It is said by a very eminent writer * on this subject, that, "in regulating the punishment of Crimes, two circumstances ought to weigh, viz. the immorality of the action, and its bad tendency; of which the latter appears to be the capital circumstance, for this evident reason, that the peace of society is an object of much greater importance, than the peace, or even life, of many individuals.

* Historical Law Tracts.

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Is it of greater importance too than the morals of many individuals? Or, more properly speaking, can the peace of society subsist without morality in the individuals of which it is composed? Can we conceive any heinous Crime, which has not, ultimately at least, a bad effect on society?

Does not the Disproportion therefore between the Crime and the Punishment, and the doctrine that the bad tendency of an action is more to be regarded than the immorality of it, greatly contribute to weaken and destroy all virtuous principles? Does it not give occasion to argue, that virtue and vice are mere political distinctions without any permanent and essential qualities? That they are the creatures of Art and not of Nature?

Can we believe that it is less criminal to rebel against Heaven than against the state? Is blasphemy then a slight offence? Is it not in fact dangerous to the peace of society? Will not the wretch, who is a rebel to his God, be a traitor to his King and Country?

Is

Is it not shocking to reason, and destructive of virtue, to contend that the ill consequence of an act is more to be considered than its immorality?

To disregard a crime, however heinous, because it may be *supposed* not to have a bad effect in society, and to punish slight offences severely, because they tend more immediately to disturb the peace of society, is to commit a degree of injustice. It is to do evil that good may come of it; it is sacrificing moral equity to political expedience.

But, in fact, the necessity of ever making such a sacrifice, is imaginary. There is no real occasion for such unnatural expedients, and the supposed necessity is of our own creating. Like unskilful artists, we begin our work at the wrong end. The distinction we make between public and private Crimes, is, in truth, subversive of the very foundation it would establish.

If we would effectually provide for the lasting peace of society, we should, first

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and principally, regard private offences, which are the sources of public Crimes. Moral men will make loyal citizens. Scarce any have ever committed Crimes against the state, who were not first rendered desperate by a series of vice and immorality. They have long remained unpunished as private offenders, who become conspicuous as state delinquents.

Nemo, says Juvenal, repente fuit turpissimus. Slight violations of moral duties lead to the commission of capital offences : and delinquents are encouraged in their first advances to guilt by the very construction of the laws themselves, which, in many most essential points, deem lightly of, or totally disregard moral violations.

The only means to secure the peace of society is, to enforce the observance of religious and moral principles. All immoral acts have ultimately the same tendency, though some are not so immediate in their effect as others.

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The people are to the legislature what a child is to a parent. A parent's first care is, or ought to be, to form the morals of a child, and rather make him dread to offend than stand in terror of punishment.

In like manner, legislators should frame laws with a view to improve the morals of the people, and rather make them afraid of the offence than of the penalty.

If, as the noble and elegant writer of the *Dialogues of the Dead* has observed, *that kingdom is happiest where there is most virtue*, it follows of course, that those laws are best which are most calculated to promote morality.

But when we are told, that the immorality of an action is not the capital circumstance, we lose all idea of moral right and wrong; and the cause of virtue suffers by such political distinctions.

The laws should rather be calculated to prove, what is true in fact, that those

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actions, which are most prejudicial to society, are in themselves most immoral: for moral virtue is nothing else than a conduct intentionally directed towards public good.

To distinguish what are called Public Crimes, by a peculiar severity of punishment, is only to provide against present and temporary mischiefs; it is to punish effects that might have been prevented by obviating their causes.

This, in part, is the reason why civil wars and sudden revolutions have been so frequent among us. The laws are armed against the *Powers* of rebellion, but are not calculated to oppose the *Principle*.

The number of those who engage in intestine commotions from motives of conscience, is too inconsiderable for computation. Few civil wars have been waged from considerations of public virtue, or for the security of public liberty. They are generally carried on by abandoned desperadoes, who seek to better their fortunes in the

the general havock and devastation of their country.

Rebellion, therefore, is no sooner quelled, but it begins to make head afresh. The discontented remain quiet, till they acquire a recruit of strength to renew civil discord. Its speedy revival is not to be wondered at; for while the same principles continue, while the bulk of the people are vicious and immoral, it will be an easy matter for a traitorous and daring leader, to engage their assistance in treasonable undertakings. Those men are easily seduced from their loyalty, who are apostates from Virtue.

To secure men from being traitors to their king and country, we must endeavour to improve and confirm them in those principles of Right and Wrong, which natural Reason suggests, instead of perplexing, or totally destroying those principles, by the help of political refinements.

The

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The subtle distinctions which Casuists make between political and moral delinquencies, are offensive to common sense. When we are taught, that it is a greater crime to coin a farthing than to kill our father or our mother, Nature revolts against the proposition.

It is in vain to tell us, that the former has a more immediate tendency to the general detriment of society. This may puzzle our understanding, but will not quiet our scruples. Our feelings instruct us that it is not a crime of so black a die as the latter, and consequently ought not to be so severely punished.

It is the triumph of Liberty, says *Montesquieu*, and, I will add, of Reason too, when Criminal Laws proportion punishments to the particular nature of each offence.

But, admitting the distinction between public and private crimes in its utmost extent, yet it will not support the conclusion

clusion which is deduced from it; for if public offences are to be more regarded, as tending more to the disturbance of society, yet condemning the offenders to punishments capitally severe, is by no means the the most reasonable way of insuring the peace and safety of the community; such severity, rather contributes to advance than to restrain their progress,

S E C T. II.

Of the Disproportion of Criminal Laws in Offences equally of a private Nature.

AS there does not seem to be a sufficient ground for an inequality of punishment, founded on the distinction between public and private Offences; so there appears to be a still less foundation for the disproportion of Offences equally of a private nature.

Of

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Of our Laws, relative to private Offences, it is to be observed, that in several instances, the punishments they inflict are wholly governed by the strict measure of property, as if that was a consideration more important than the concern for honour, reputation, or even personal security.

For a personal assault, be it ever so violent, provided the assailant does not kill or maim the party assaulted, the offender is seldom punished with any other sentence than the payment of a fine. But if a delinquent steals from his neighbour, secretly, more than the value of twelve pence, the Law dooms him to death; and his punishment is no greater, if he slaughters a whole family, with the most cruel circumstances of murder.

In these cases the disproportion is manifest; in a farther instance, though the the disparity is not so flagrant, it is nevertheless extremely observable. To seduce another man's wife, and to commit adultery with her, is not, in the eye of the Law,

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Law, an Offence of a *criminal* nature, but is cognizable by the *civil* jurisdiction. Yet surely to alienate a woman's affections from her husband, to defile her person, and to dishonour his bed, is a crime much more prejudicial to the peace of society, than to rob him of a trifle exceeding a shilling.

Though the influence of bad example, which alone is supposed to make an act criminal with respect to society, may not be so extensive in the former case as in the latter, yet certainly it is more fatal. Admitting, which nevertheless may be disputed, that there are a greater number of delinquents ready to make your purse their booty, than to make your wife a prey to their sensuality; yet the injury received by the one, is inconsiderable in comparison of that sustained by the latter.

A man's wife may be deemed no less his property than his money; and if she be the wife of his choice, may be considered as the most valuable of his possessions; an attempt therefore to rob him of so inesti-

mable an enjoyment, is far more Criminal in the eye of Reason, than to deprive him of a few pence. He must have but a faint experience of conjugal endearments, and must indeed be totally lost to all sense of honour, who does not rate his wife's affection and fidelity at a higher price than the wages of a hangman.

The crime of adultery was punished with great severity by the *Grecian* and *Roman* laws.

In the earlier times of *Athens*, the punishment seems to have been arbitrary.

Homer makes *Hector*, in rebuking *Paris*, tell him, that his crime, in stealing another man's wife, deserved no less punishment than *λαινὸν χιτῶν*, viz. to be stoned to death. Rich adulterers were, however, sometimes allowed to redeem themselves by a fine (called *Μοιχαργία*) paid to the husband of the adulteress; whence *Homer's* gods all agree, that *Mars*, when caught with

with *Venus*, ought to pay this fine to *Vulcan*, who would not consent to his enlargement, till *Neptune* had engaged for the payment of it.

By the *Jewish* Law, adultery was punished with death, and so was double adultery by the Law of *Scotland*.

By the ancient Laws of *England*, this crime was punished very severely; but at present it is only punished by fine and penance in the Spiritual Court, or by an action at Common Law, for damages. However, adultery, as a temporal Offence, being against the peace and good order of society, it should seem reasonable to suppose, that it was under the cognizance of the Criminal Jurisdiction, and consequently indictable.

As to the adulterers, by our Law she undergoes no temporal punishment whatever, except the loss of her dower; and she does not lose even that, if her husband is reconciled to her, and cohabits with her
after

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after the Offence committed, according to the following distich :

*Sponæ virum fugiens mulier, & adultera facta
Dote suâ careat, nisi sponsi spontè retracta.*

Thus we may perceive, that while our Laws have been stretched to an unreasonable degree of severity in points of property, and with respect to Offences deemed merely political, they are become shamefully lax and remiss with respect to moral crimes. This is certainly counteracting the very principles of our constitution; for a free state like ours, which is a kind of Royal Republic, cannot be sustained without the support of Moral Virtue.

In *Scotland*, where a more strict attention is paid to the duties of Religion and Morality, we find that the common people are much more regular and virtuous in their conduct than ours, and likewise more intelligent and useful members of the community. There is no doubt but that a public inattention to Morality, tends to render

render the common people ignorant and dissolute; for the want of religious and moral principles leads to a habit of dissipation, which is the parent of vice and stupidity.

Our temporal Laws pay so little regard to Moral Virtue in the provisions against adultery, that people in low degree may, in fact, live in common, and commit the most flagrant violations of conjugal rights with impunity; for it will be in vain for the injured party to attempt the recovery of damages against the adulterer, who probably has no substance, out of which he can make satisfaction: Add to this, that the injured husband likewise is not in circumstances to pursue a legal remedy.

It seems reasonable, therefore, that adultery should be cognizable by the Criminal Jurisdiction. Such offenders might be proceeded against by way of indictment, and if found guilty, be adjudged to pay a fine, to be rated according to their station and circumstances; part thereof to be applied

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plied towards satisfaction of the party injured, and the remainder to be paid to the Fisk, as a compensation for the breach of the peace, and the injury done to society; and in default of payment, the offender to suffer imprisonment.

The adulterers might undergo some public stigma, and be imprisoned for some time, at the discretion of the court, according to the circumstances of the case.

Some provisions of this kind would shew, that our Laws have a regard to the Morals of the subject, which, in all Laws, ought to be the primary consideration; since Laws without Morality are but weak guardians of our persons and property.

Violations of connubial faith are of great prejudice to society; they lessen that regard and attachment which man and woman, who cohabit together, ought mutually to entertain. They are the bane of domestic tranquility, which is the surest pledge

pledge of Social Virtue; for a perturbed mind is always dangerous to society.

Adultery, by consent of the woman, is in some cases more heinous, philosophically considered, than a rape; for the husband hath certainly a greater injury done him, if the woman be debauched and made willing, than if she were ravished by force; for in the first case her mind is estranged from her husband, in the other it is not.

It is true, that next to the safety of our persons, the preservation of our property is the most immediate and important consideration. These purposes, narrow as they seem, were the first and sole inducements to civil society: but in its present improved state, they are too limited to be any longer regarded as the only objects of consideration.

Besides, adultery may be deemed a personal injury, and the Law itself, in some instances, thinks so severely of this invasion

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of right, that it goes so far as to construe it only man-slaughter when a husband kills a man taken in adultery with his wife.

The most noble, and we may add, the primary ends of society, are to humanize the minds, soften the manners, enlarge the understanding, and correct the morals of the individuals which compose the community; in short, to promote reciprocal integrity, benevolence, and charity, between man and man. Those extensive purposes are, in a great measure, to be effected, by adapting the Laws to the genius of the people.

Having taken this general view of our Criminal Laws in their various relations, in order more fully to illustrate what has been said, it will be proper to enter into a more minute examination. For this purpose, I proceed to consider some distinct species of Offence made Criminal by our Law, and to compare the punishments allotted to each, with those of other countries.

BOOK

BOOK III.

CHAP. I.

*Of the different Species of Criminal
Laws.*

WE have already observed upon the inaccuracy of arranging Criminal Offences, so as to postpone the primary Laws of Religion and Morality to those of a secondary nature, which relate to the political interest of society.

We shall however adopt the common arrangement in treating of the civil crimes, and the punishments annexed to them, and shall therefore begin with High Treason, as the highest civil crime which can be committed by a member of the community.

S E C T. I.

Of High Treason.

HIGH Treason is an offence defined and described by several Statutes. By the 25 Edw. III. Stat. v. chap. 2. which is to this day the ruling Statute, it may be committed in these seven following instances :

1. By compassing and imagining the death of the king, queen, or their eldest son and heir.

2. By violating the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir.

3. By levying war against the king in his realm.

4. By

4. By adhering to the king's enemies in his realm, giving them aid or comfort in the realm, or elsewhere.

5. By counterfeiting the king's Great Seal, or Privy Seal, or Money.

6. By bringing false money into the realm, counterfeit to the money of *England*, knowing the money to be false, to merchandize or make payment with it.

7. By slaying the Chancellor, Treasurer, or the king's Justices of the one Bench or of the other, Justices in Eyre, Justices of Assize, or other Justices assigned to hear and determine, being in their places, doing their offices.

By later Statutes, many offences are made High Treason, which were not so before; as those concerning the Coin, the Pope, Popish Priests, and Papists, the Protestant succession, and soldiers enlisting in foreign service.

It is no part however of the present design, to enter into a minute detail of treasonable Offences, but only to give the reader a general view of the most enormous species of Treason, in order that he may be better able to judge of the propriety of such reflections as will be offered to his consideration, on the subject of this crime.

S E C T. II.

Reflections on the Stat. 25 Edw. III.

THE Statute above quoted, enumerating the crimes of High Treason, appears to be not only extremely severe, but strangely undistinguishing.

The president *Montesquieu* says, If the crime of High Treason be indeterminate, this alone is sufficient to make any government degenerate into arbitrary power.— Again, he says, That it is a violent abuse to give the name of High Treason to a crime which is not so in fact; it tends to con-

found our ideas of things, and to diminish the horror of the crime.

By the ancient laws of *England*, the crime of High-treason was so uncertain, and the resolutions of the judges upon trials for that offence so various, that it became absolutely necessary to ascertain by this act of *Edw. III.* what should for the future be Treason; but in the reign of *Richard II.* so many new Treasons were declared, as made it necessary for the legislature in the next reign, (that of *Henry IV.*) to repeal all those new-created Treasons, by a statute, reciting, *that no man knew how he ought to behave himself, to do, speak, or say for doubt, of such pains of Treason.*

But to return to our Reflections on the Stat. 25 *Edw. III.* the dignity and security of the King's person is here confounded with the persons of his officers, and to assassinate the servant, is as criminal as to destroy the Sovereign.

This is not all. The King's real person is confounded with his effigies imprest on his

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his coin; and to counterfeit the type of Majesty, is held as criminal as to lift the sword against the living Monarch.

It would be tedious to produce farther instances wherein the different degrees of criminality are confounded, and the Majesty of the Sovereign undervalued, by placing offences, whereby the security of his person is no way endangered, and even his dignity only indirectly prejudiced, in the same rank of delinquency with those whereby the safety of the Royal Person is immediately injured and endangered.

This indiscriminate blending of crimes, so different and disproportionate in their nature, under one common head, is the more liable to objection, as the judgment in this offence is so extremely grievous and terrible.

S E C T. III.

Judgment in High Treason.

THE Judgment in High Treason is such as one cannot transcribe without horror; it is, that the offender shall be drawn upon a hurdle to the gallows, and there hung by the neck, and cut down alive; his entrails taken out, and burnt; his head cut off, his body quartered; and his head and quarters to be at the King's disposal: but beheading being part of the Judgment, the King may pardon all the rest, under the Great Seal, as is usually done in case of nobility.

The Judgment for counterfeiting the coin is by the common law, and is only to be drawn upon a hurdle and hanged. But clipping being made High Treason by subsequent statutes, the Judgment, as some contend, is to be hanged, drawn, and quartered, though the practice is otherwise.

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The Judgment for a woman in all cases of High Treason, is to be drawn upon a hurdle, and burned.

SECT. IV,

Reflections on the Judgment in High Treason.

WITH respect to the foregoing Judgment, it disgraces humanity, without answering the ends of policy. Nature shudders at the thought of imbruing our hands in blood, and mangling the smoking entrails of our fellow-creatures. This is more than cruelty. It is such savage butchery as might even stain a Hottentot.

It seems difficult to conceive that such a Judgment could have been devised by a human being; or having been established in the days of ignorance, bigotry, and barbarity, that it should be suffered to continue at the present civilized and enlightened period.

To

To imagine that the horrid severity of it will deter criminals from the crime, is a vain supposition. To men who engage in desperate and criminal undertakings, with a prospect of death before their eyes, the mode of dying is an addition of terror too inconsiderable to restrain them from perpetrating the intended crime.

Such brutal execution seems as absurd as it is unnatural; for it shocks the spectators, and pains the imagination of all who reflect on the criminal's fate, without adding to his punishment: for it is well known, that before the work of butchery begins, the delinquent is generally past the sense of feeling.

Besides, as few can distinguish so nicely as to be sensible that a crime against the peace and order of society necessarily includes the highest degree of moral turpitude, so there are many zealots so blinded with party-prejudice, that they impose upon themselves so far, as to think the heinous crime of High Treason to be no reproach to their moral character.

Perhaps

Perhaps the very frame of the Law may, in some measure, contribute to lessen the sense of the moral turpitude of High Treason; for by Law Treason can only be committed against the King *de facto*; and a King *de jure* is not within the meaning of the act.

Nay, it is said, that if Treason be committed against the King *de facto*, and not *de jure*, and the King *de jure* afterwards comes to the crown, he shall punish the Treason done against the King *de facto*; and a pardon granted by a King *de jure*, that is not also a King *de facto*, is void.

Men, who can abstract their ideas, know that the peace and order of society requires this distinction, and that individuals should not be allowed to decide concerning the sovereign title. But it nevertheless seems to militate against the moral rules of right and wrong, to doom an offender to the severest of all punishments, for supporting what he conceives to be a just title.

They

They, who have not capacity to discover with precision the true grounds of this political principle, and to perceive that in the end it squares with moral rectitude, are misled by its seeming incompatibility with moral justice, and think it meritorious to yield assistance for the recovery of a just title.

Under the influence of this opinion, the rigour of the sentence rather serves to inflame their zeal. The more they risk, the greater they deem their merit.

They consider themselves as so many political martyrs; they glory in perishing in their traitorous principles, with the same fortitude that the prelates of old adhered to their religious tenets; and *rebels* triumph on the scaffold, like *Ridley* at the stake.

Their resolute and determined behaviour often leaves bad impressions on inconsiderate minds. Many pity the sufferer who braves his fate, and often silently reproach the hand which doomed him a sacrifice to justice.

They are often misled to conclude, that those principles must be just for which men can die with such resignation and intrepidity; and, from admiring the traitor's magnanimity, they are sometimes betrayed so far as to approve the Treason.

Thus, these rigorous punishments counterwork their own intentions. They often make loyal subjects, of tender feelings and weak judgments, prove traitors in their hearts; and dispose them to adopt sentiments from compassion, which reason bids them abhor.

S E C T. V.

Of the Laws of other Countries, ancient and modern, in Cases of High Treason.

IT must be confessed, that the general custom of most nations, both ancient and modern, seems to authorize the practice of punishing Treason and Rebellion with death.

We

We do not read, however, that among the *Egyptians* either of them were capitally punished; indeed they are not so much as mentioned by name.

It is likewise observable, that by the *Jewish* Law we do not find any punishment prescribed, against the crime of Treason or Rebellion.

Lord Coke indeed observes, that all the several parts of the punishment in High Treason are to be found in Holy Scripture; and he mentions the several instances where each has been separately inflicted on different individuals; that *Joab* was drawn; *Bithan* hanged; *Judas* embowelled; *Sheba*, the son of *Bichri*, beheaded; *Baanan* and *Rechab* quartered, &c. *

But his Lordship has not shewn, nor is it supposed he could shew, where these punishments have been inflicted *simul ac semel* on a Traitor. Besides, examples might be brought from the Old Testament, to justify many practices which are now

* 3 Inst. 211.

happily exploded. The New Testament, which is the pattern of Christian Duty, breathes another spirit. Benevolence, Humanity, and mercy, are the precepts of our Saviour and divine Lawgiver.

If we recur to the *Athenian Laws*, we shall find, that they also took no cognizance of Treason or Rebellion as capital offences; on the contrary, it is only provided by those laws, that

He shall be denied burial within *Attica*, and his goods exposed to sale, who hath been convicted of perfidious behaviour towards the state, or of sacrilege. And, farther, that

He who hath betrayed his country, shall not enter into the borders of *Attica*.

Even during the usurpation of *Pyfistratus*, the tyranny of the Four Hundred, or the usurpation of the Thirty, we do not find that Rebellion or Treason were made capital offences by Law; though it must be confessed, that none of them scrupled to
 dispatch

dispatch those privately, who made head against their government, or, more properly, their tyranny.

In a state where the system of government was so equal and mild, such severe Laws would have alarmed the people more than the exercise of actual tyranny.

Even in *Rome*, we do not find that there were any Laws against Treason and Rebellion in the days of their liberty; and when such Laws were made, they did not secure the state against the violent shock of civil commotions.

The *Cornelia Lex*, of which *Cornelius Sylla*, the dictator, was author, may be deemed the first of this kind. By this Law it was made Treason,—

To lead an army out of the province, or to engage in a war without special orders:

For any one to ingratiate himself with the army, so as to make them ready to serve his particular interest:

X 2

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To spare or ransom a commander of the enemy, when taken prisoner, or to pardon the captains of robbers and pirates.

Or for a *Roman* citizen to reside, without orders, at a foreign court.

The punishment of *aqua et ignis interdictio*, was assigned to be inflicted on those who should be convicted of any of those crimes.

Every one may perceive that this Law speaks the language of an usurper. By this, every officer, who gained, or was maliciously represented as endeavouring to conciliate the good-will of his fellow-soldiers, might be convicted of Treason, and made a victim to the jealousy of the ruling tyrant.

The *Lex Julia*, of which *Julius Caesar* was the author, ordained the punishment mentioned in the *Lex Cornelia* to be inflicted on all who were found guilty of the *crimen de majestate*; whereas *Sylla* only confined it to the particular species of offence therein specified.

We

We find, however, that this extraordinary severity could not secure the usurping *Cesar* in the enjoyment of the fruits of his usurpation.

By the Laws of *Persia*, indeed, the crime of High Treason was punished with the loss of the right hand and beheading: Which sentence was, by order of *Artaxerxes*, executed on the dead body of his brother *Cyrus*.

But by the ancient Laws of the *Persian* kingdom, the king was restrained from putting any man to death for a single crime. The judges were to examine narrowly into the actions of the delinquent; and if his faults were found to overbalance his former services, the king was allowed to punish him at pleasure; if not, he was either pardoned or punished less severely.

When the *Persian* monarchy, however, became despotic, it is no wonder that Treason was in the first instance made capital, since such a provision was adapted to the spirit of the government.

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By the Laws of *China* likewise, we find that Rebellion and Treason were esteemed the greatest of all crimes, and punished with a rigour equal to the severity of our judgment, viz. by cutting the criminal into ten thousand pieces, after the following manner:

The executioner having first tied him to a stake, tore the skin of his forehead and head, and let it hang over his eyes, to prevent, as some imagine, his seeing how dreadfully the rest of his body was mangled; he next slashed the other parts with a kind of cutlass, till he had cut almost all his flesh in pieces; and then abandoned him to the cruelty of the gazing populace, who commonly dispatched him in the same butcherly manner.

This punishment, however, we are told, was seldom executed. For the usual punishment for Treason consists only of cutting the body of the criminal into several pieces, ripping up his belly, taking out his entrails, and then throwing his carcass into a river or ditch, and this is commonly done to great malefactors.

When

When we consider the system of the *Chinese* Laws in general, with the lenity and excellence of their government in most instances, we may be at a loss to account for this inhuman provision; but, perhaps, the great reverence and veneration which they pay to the emperor, may have led them to this extreme severity in cases of High Treason.

S E C T. VI.

Same Subject continued.

IN *Scotland* the punishment of Treason is death, and confiscation of all the traitor's estate, whether hereditary or moveable, feudal or allodial. But in the sentence of the *Scotch* Law, there is none of that butchery which stains our judgment in High Treason.

Yet, notwithstanding the terror of death and confiscation, it is observable, from a perusal of the *Scotch* history, that *Scotland* has been particularly fruitful in rebellions.

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In short, in those states where the system of government has been most mild, and the establishment most equal, the crimes of Treason and Rebellion were either unknown to the Laws, or, if they fell under their cognizance, they were but slightly punished.

In this kingdom, by the feudal Laws of the *Anglo Saxons*, composition was allowed for what is now justly deemed the most grievous kind of *Treason*, that of *killing the king*.

It must be remarked, however, that our ancestors, the *Saxons*, had not such severe notions of *Treason* against the *king*, as of *Treason* against the *kingdom*; and after the killing of the king came to be a capital offence, yet it was some time before it was esteemed *Treason*.

The *Saxons*, says *Nat. Bacon*, being a people of public spirit, preferred the good of their country above all, accounting treachery against it, or neglect of it in times of danger, to be a crime of the most grievous nature, and which ought to be punished in a most

most exemplary manner, *proditores et transfugas arboribus suspendunt*, says Tacitus. Other Treasons than this, not even against their kings, did they acknowledge.

The form of an indictment therefore for contriving the death of the king, concluded only *felonice*, as appears from the form of an indictment for an offence of that nature, intended and plotted against Edmund the Saxon king; whereas for the plotting against allegiance, of a common and inferior nature, the indictments concluded *felonice et proditorie*: And whereas the penalty, in case of *treachery* against the country, was death, and forfeiture of the whole estate, both real and personal; in *treachery* against the king, it was only loss of life and of personal estate.

It seems therefore that Majesty had not then arrived at its full growth, or that the greatest measure of it rested still in the body of the people.

In the time of Hen. II. Treason, which formerly was only considered as a breach of
of

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of trust or fealty, was made equal with that of *Lesa Majestas*; and that *Majesty*, which was afterwards wholly wrapped up in the person of the *king*, was, in his time, imparted to *the king and kingdom*; whereas before his days, as already observed, it related chiefly to the *kingdom*.

Therefore, *Glanville*, in his book of Laws, speaking of the wound of *Majesty*, exemplifies sedition and the destruction of *the kingdom*, to be in equal degree a wound of *Majesty*, with the destruction of the person of *the king*: And next he mentions sedition in the army, and fraudulent conversion of treasure-trove, which belongs to the king; all which, he saith, are punished with death, and forfeiture of estate, and corruption of blood.

In the *Saxon* times, before the king could be properly considered as one of the three separate estates, or orders of government, it is no wonder that they deemed treachery against the king, and treachery against the kingdom, to be distinct crimes.

In those days, the king was only regarded in the light of the head magistrate; but since the king is become one of the three estates in the kingdom, crimes against the royal person, are very properly placed on the same footing with crimes against the kingdom; for though the king, in his political capacity, as one of the three estates, never dies, yet when we reflect on the confusion and calamities in which the nation may, nay must be involved, by crimes against the sovereign person, it is a reasonable presumption to conclude, that such offenders intend the dissolution of government.

At Common Law, and before the Statute of 25 *Edw. III.* Treason was, as has been said, a very uncertain crime; and the opinions concerning it were very various. The killing of the king's father, brother, or even messenger, was deemed Treason. The *accroaching*, or attempting to exercise royal power, was treasonable, and the Judges determined what amounted to such *accroaching*.—In one instance mentioned
by

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by Lord Chief Justice *Hale*, a Knight of *Hertfordshire* was found guilty of Treason, for assaulting and detaining his debtor till he discharged the debt. When any acts tended to diminish the dignity of the crown, or when any man grew inordinately popular, this was construed to be an encroachment on the royal power, and as such, held to be Treason.

Thus, by the excess of former times, any crime, by aggravating the circumstances with which it was attended, was heightened into Treason. On which account, the above-mentioned Statute of *Edw. III.* was made to determine what should be adjudged treason; and for the excellence of this and other Statutes, the parliament in which they were made was called, *benedictum parliamentum*.

Since the making of that act, there can be no constructive Treason; that is, nothing can be construed Treason, which is not literally specified in that or subsequent acts.

There

There was a remarkable clause in this Statute, by which it was provided, that if any other case should happen, before the Justices, supposed to be Treason, they shall not proceed to judgment, till it be declared by the king and parliament, whether it ought to be adjudged Treason or not.

This, it is evident, was leaving an unbounded latitude in the legislature, to remove any offender who was obnoxious to them, by a construction *ex post facto*.

Lord Chief Justice *Hale*, in the 1st vol. of his Pleas of the Crown, page 259, says, That as the authoritative decision of these *casus omitti*, is reserved to the king in parliament, the most regular way to do it, is by a new declarative act.

Though this act of *Edw. III.* at the time of passing it, was intended to keep the legislature, as well as Judges, within proper bounds, as to the crime of Treason, yet, in the time of king *Rich. II.* next immediate

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immediate successor of *Edw. III.* several other Treasons were created, as is before observed; and in the succeeding reigns, other crimes of different natures were declared to be High Treason.

By 26 *Hen. VIII.* chap. 13. It was made High Treason to wish, or desire, by words or writing, or to *imagine* the death of the king, queen, or their heir apparent; or to publish that the king was an Heretic, Schismatic, Infidel, &c.

Every one must conceive the absurdity of making it Treason to *imagine* the death of the king, unless the intention be shewn by some open or overt act. This loose and ambiguous expression *imagine*, which is a bare act of the mind, laid every one at the mercy of malicious construction; and could not but be attended with inconvenience to the king himself, as it was to *Hen. VIII.* whose physicians, it is said, were afraid to declare him in danger, lest they should incur the penalty of Treason.

But

But the Laws with respect to Treason, were uncommonly severe in this reign.—

By 33 *Hen. VIII.* If a man, *non compos mentis*, commit High Treason, and after accusation, &c. become mad, he might be tried in his absence, and suffer death as if he were of perfect memory. And by the same Stat. If a man attainted of Treason become mad, he was executed notwithstanding.

By the 1 *Edw. VI.* chap. 12. To endeavour to depose the king, or to affirm, that he is an Usurper, Tyrant, &c. was declared Treason.

But these acts were repealed by the 1st *Mar. Sess.* chap. 1. By which it was enacted, that no act, deed, or offence shall be deemed or adjudged Treason, but such as are declared and expressed to be so by the 25 *Edw. III.*

The 1st *Mar.* likewise takes away the power of the king, and parliament, to adjudge anything else to be Treason than what is declared to be such by the 25th *Edw. III.*

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Nevertheless, the 1st *Mar.* has been in some measure repealed, and many offences have been declared Treason by subsequent Statutes, which were not so before, as has been shewn above. Upwards of twenty offences have, since that time, been declared Treason, which were not so by the Stat. *Edw. III.* and, in truth, the greatest part of these offences require a forced and unnatural construction to bring them under the crime of Treason.

So likewise do many of the offences made Treason by 25 *Edw. III.* as before observed; particularly that relating to the coin; and it does not appear that counterfeiting the coin was Treason at the Common Law, though by the preamble to the Statute of *Edw. III.* all the offences therein specified, are declared to have been Treasonable at the Common Law.

We read in *Malmſbury*, that, by a Law of *Hen. I.* falsifiers of money were adjudged to lose their right hands, in the words of the Law, *pugnum perdere*. *Hoveden* tells us, that falsifying of money was punished with
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the loss of eyes and genitals. But *Gemistensis*, and the Monk who made the continuation of *Florence of Worcester*, agree with *Malmfbury*, that the offenders lost their right hands; adding, however, that they likewise incurred the loss of genitals; that he, as *Selden* observes, who was guilty of such a wicked crime, should have no hope left him of posterity.

From hence we may conclude, that in those times it was not treasonable; and in farther support of this conclusion we may add, that *Fleta* does not rank the counterfeiting the Seal, or the Coin, among the *crimina lese majestatis*, but among the *crimina falsi*.

We do not find, that, by the Laws of any ancient kingdom, this offence was adjudged treasonable; though it must be owned, that it was punished capitally in *Egypt*; and likewise by the *Athenian* Laws, all counterfeiters, debasers, and diminishers of the current Coin, were doomed to lose their lives.

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But in *England*, clergy was formerly denied only in such Treasons as were immediately against the king's person; and therefore clergy was allowed in case of counterfeiting the Great Seal.

Having made these observations on the judgment in High Treason, it remains to consider the forfeiture in High Treason, implied by that judgment.

S E C T. VII.

Of Forfeiture in High Treason.

IN the judgment in case of High Treason, it is implied, 1. That the delinquent shall forfeit to the king all his lands, tenements and hereditaments in fee simple or fee tail (or for life, as to the profits, during the offender's life) which he had at the time of the Treason committed, or afterwards. 2. That his wife shall lose her dower, not her jointure. 3. That his blood shall be corrupted, by becoming base

as to his birth, and that his children shall not inherit to him or any of his ancestors:

4. That all his goods and chattels shall be forfeited from the time of conviction:

S E C T. VIII.

Reflections on Forfeiture in High Treason.

HOWEVER these grievous Forfeitures appear to be repugnant to the principles of moral justice and equity, as they involve the innocent in the severe fate of the guilty; yet they have been justified on the footing of policy, as the most effectual means of restraining delinquents from disturbing the peace, or prejudicing the interests of society.

It is true, indeed, that many of daring and desperate minds, who are totally regardless of their own safety and welfare, when under the influence of any violent

passion, have nevertheless a tender consideration for their family, which may check their impetuosity, and deter them from criminal and traiterous enterprizes.

But the number of these is small. Few, very few, weigh future considerations in a just balance; the far greater part are governed by the hope of gratifying some ruling passion, or the prospect of securing some immediate advantage.

Many of those, who do not act from a principle of party zeal, are often betrayed by the vain expectation of benefiting themselves and their families by the fruits of their delinquency.

Some engage out of mere despair. Pinched perhaps by the remorse of an ill-spent life, and driven to extremities by the terrors of conscience, they lose all regard to themselves, all attention to the welfare of their family, and only think of procuring immediate relief from pungent misery, by burying thought in the confusion

sion of turbulent undertakings, and the tumult of civil revolutions.

To men who move under any of these impressions, the dread of distant forfeitures are ineffectual restraints; some, as has been observed, from the wretchedness of their condition, are insensible to the care of posterity; and others flatter themselves with the hope of serving their families by their crimes.

However, therefore, the State may sometimes draw profit from such grievous forfeitures, it derives no security from them; since so far from preventing, they rather tend perhaps to multiply the offence of High Treason.

If I may be allowed the expression, they seem to perpetuate a kind of *deadly feud* against the State. The descendants of a traitor, finding themselves deprived of the honours and estate to which they were born, without any guilt of their own to incur the forfeiture, naturally contract an antipathy

against the government; which, as they imagine, has treated them with injustice and oppression.

It is in vain to oppose the arguments of policy, against the feelings of Nature. We shall never persuade the innocent son, that the good of society requires him to suffer for the crime of a guilty father.

However willingly we may accede to this proposition, when we ourselves are not affected by the concession, yet when we become the victims of this political axiom, we instantly revolt against the principle.

If we may judge from effects, we may safely conclude, that such rigorous provisions, do not answer the end of their institution. Notwithstanding the severity of our Laws in cases of High Treason, yet where have been more frequent rebellions, than in this kingdom?

Rebellion seems to be the growth of our isle; and the rigour of the Law, instead

stead of extirpating, rather seems to give it firmer root. The descendants of the deceased adopt the traiterous principles of their ancestors; and by reflecting on his miserable state, (the remembrance of which is continually revived by their own oppression, which, as they conceive, *was* unmerited) they are incessantly excited to revenge.

In truth, however, it does not seem only impolitic to involve children in the fate of an offending ancestor, by the consequences of such forfeitures, but it may be farther urged, that it is, in some measure, unjust; for if the right of succession to patrimonial estates, is a right of Nature, then no Law whatever can, or at least ought, to abridge that right.

Having therefore said thus much of the Laws respecting High Treason, I proceed to the next offence adjudged capital, which is Petty Treason.

C H A P. II.

S E C T. I.

Of Petty Treason.

PETTY Treason is an offence described by the Statute of 25 *Edw. III.* chap. 3. and is committed when a servant killeth his master, when a wife killeth her husband, or when a secular or religious slayeth his prelate, to whom he oweth faith and obedience.

S E C T. II.

Reflections on Petty Treason.

IT is here observable, that notwithstanding the breach of obedience, due to the superior slain, constitutes the essence of this crime, yet if a child kill his father or mother,

mother, he is not within the Statute; unless the child served the father or mother for wages, &c. in which case, he shall be indicted by the name of a servant.

This is absolutely reversing the degrees of criminality; for certainly the obedience due from a servant to a master, falls infinitely short of that due from a child to a parent. If therefore the violation of obedience is the circumstance which makes the offence treasonable, parricide is certainly the most aggravated species of Petty Treason.

Among the *Romans*, it was provided by the *Lex Pompeia*, that parricides should be sown in a sack with a dog, a cock, a viper, and an ape, and thrown into the sea, to perish by the most cruel of all tortures.

By the Laws of *Egypt*, parricides were put to the most cruel deaths; first their limbs were mangled, and their flesh cut into small pieces with sharp reeds; afterwards they were laid on thorns and burnt alive. Parents, on the contrary, who killed

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killed their children, were not adjudged to die, but were obliged to embrace their dead bodies for three days and three nights together; a guard being set over them to see that they punctually obeyed the law.

By the criminal laws of the *Jews*, it was death for children to curse or strike their parents; nay, if they only continued in a stubborn disobedience to their commands, parents had a right to inflict any punishment on them except death; and if the punishment they inflicted proved ineffectual, they might then bring them and accuse them before the judges; who, upon full proof, were obliged to condemn them to death without mercy or delay.

By the laws of *China*, disobedience to parents was ranked in the next degree of criminality to Rebellion and Treason, and was punished with the same, if not greater, severity.

By the laws of *Scotland*, it is death for a child to curse his father and mother, if

the offender is past sixteen; if he is under sixteen, and above pupilarity, it is punished at discretion. If he kills father or mother, good-fire or good-dame, he is to suffer death, and his posterity in *linea recta* are incapable of succeeding to the person killed, but the succession devolves upon the next collateral or nearest of blood.

But, among us, the crime of parricide is placed in the same degree of delinquency with that of common murder; at the same time that offences, far less heinous, either morally or politically considered, are punished as Petty Treason.

This strange and unnatural inequality is by no means calculated to inspire that filial awe and reverence towards our parents which the divine law enjoins, and which all human laws whatever ought to inculcate.

S E C T. III.

Of the Judgment in Petty Treason.

THE Judgment in Petty Treason is the same as in capital felonies, with this distinction only, that a man is to be drawn on a hurdle (instead of a cart) and hanged; and a woman is to be drawn on a hurdle, and burnt, instead of being hanged, as in cases of felony.

This Judgment for women, who killed their husbands, is of very ancient date. It prevailed among the *Gauls*, and likewise among the *Britons* before the descent of *Julius Cæsar*, and was in use at his landing, as we may learn from his Commentaries, *De morte mariti, si compertum est uxorem, &c. igne Britanni interficiunt.*

It was in use also in *Bracton's* time, as appears, lib. iii. fol. 105. *Ignе concremantur, qui salutem dominorum suorum insidiaverint.*

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We find, however, from the foregoing Judgment, that whatever distinction our law has made, as to the nature of the crime, between this crime and felony, there is very little difference as to the punishment. But no objection seems to lie against the Judgment.

SECT. IV.

Of Forfeiture in Petty Treason.

THE Forfeiture in Petty Treason and Felony is the same as in High Treason, as to lands and tenements upon *attainder*, and as to goods and chattels upon *conviction*: Except that upon attainder in Petit Treason or Felony, lands and tenements entailed are forfeited only during the life of the tenant in tail: The inheritance goes to the issue.

It is likewise observable, that, upon attainder of Petty Treason, the wife is not dowable, but upon attainder of felony she is dowable.

SECT.

S E C T. V.

Observations on the foregoing Section.

WHAT has been said above with respect to forfeitures in High Treason may be applied to forfeitures in Petit Treason; they seem to be equally impolitic and severe. It must be observed nevertheless, that the difference of the forfeiture with respect to entailed lands upon attainder, is very material; and it seems difficult to conceive, why the same distinction should not hold with respect to lands in fee.

CHAPTER III.

SECT. I.

Of Felonies.

BEFORE we proceed to treat of Felonies, it may not be improper previously to take notice of the impropriety of confounding crimes of a very different species under one general head of Felony, which is both contrary to the nature of things, and the true meaning of the word.

Lord *Coke* inclines to think, that Felony is derived from the *Latin, fel*; and he defines it thus: *Ex vi termini significat quodlibet capitale crimen felleo animo perpetratum*; and it was anciently, he adds, of such extent, as to include *high treason*.

This, however, with the utmost deference to such respectable authority, seems to be no very satisfactory definition of Felony, which does not only signify *quodlibet capitale*

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talē crimen, but comprizes many crimes which are not capital, nor yet can be said to be perpetrated *felleo animo*; such as *chance-medley, se defendendo, petty larceny, &c.* which are deemed Felonies in law, but are neither capital, nor committed *felleo animo*.

Nay, there are capital offences which cannot be said to be done *felleo animo*; grand larceny, for instance, or the stealing of goods above the value of twelve pence, cannot be said to be done with a bitterness of heart, which seems to imply a malicious disposition in the offender towards the person of the injured; whereas this offence may be, and is frequently, committed where the person of the injured is utterly unknown to the delinquent: and, indeed, in all cases of grand larceny, the fraudulent intention cannot be presumed to be accompanied with what is usually understood by the words *felleo animo*, which express a bitterness of disposition.

The learned *Spelman's* distinction seems rather more satisfactory. He supposes it to
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come from the *Saxon* word *feal*, which signified a reward or estate; and the *German* word *lon*, which in *English* means price. Felony being formerly punished with the price or loss of estate; many, indeed most Felonies, before the time of *Hen. I.* were punished by pecuniary fines, and he was the first who ordered felons to be hanged, about the year 1108.

But whatever may be the etymology of the word, it seems highly improper to confound crimes of distinct species under one genus. This tends to confound our ideas of delinquency, and establish a technical division of offences, which is inconsistent with propriety of language, as well as repugnant to natural reason, with which all laws should coincide.

We must be content, however, to take the matter as it stands, and therefore let us return to the consideration of Felonies; of which the first division relates to public offences.

S E C T. II.

Of Public Felonies.

AS it is not proposed to make a technical analysis of criminal offences, but only to take such a general view of the subject as may tend to illustrate the principles intended to be established; I shall therefore pass slightly over Public Felonies, and content myself with a bare enumeration of them.

They relate, 1. To coin. 2. To Felonies against the king and his counsellors, &c. 3. To Felonies of soldiers and mariners. 4. To Felony, by embezzling the king's armour. 5. To Felonies relating to popish priests. 6. To Felonies by rioters. And, 7. To Felonies by breach of prison, escape, and rescues, and to the revenue and trade.

Of these it will be sufficient to observe, that most of them are offences, merely political, and that none of them, for reasons already

already assigned, ought either in justice or policy to be considered as offences which should be punished with death.

SECT. III.

Of Private Felonies.

PPRIVATE Felonies may be committed,
1. Against the life. 2. The body.
3. The goods: Or, 4. The habitation of
the subject.

Private Felonies against the life of a subject may be committed by destroying him;
1. By murder. 2. By man-slaughter,
3. By chance-medley. 4. By necessity.

CHAP. IV.

SECT. I.

Of Murder.

1. **M**URDER may be committed upon one's-self, or upon another.

Murder may be committed upon one's-self, when one *compos mentis* kills himself with deliberation and direct purpose; in which case, the self-murderer is termed *felo de se*.

If one maliciously attempting to kill another, and in pursuance of such attempt unwillingly kills himself, he is *felo de se*; as when one hastening to kill another, falls upon his weapon, which he held up in his own defence; though some incline to think that he is not *felo de se*, unless he dies by his own weapon, and that otherwise it is *per infortunium*.

But death must ensue within a year and a day.

SECT.

S E C T. II.

Reflections on the foregoing Section.

TH E good of society requires, no doubt, that this crime should be punished in as exemplary a manner, as the nature of it will admit; and perhaps the ignominious method of burying such felons is as efficacious as any which can be devised.

The method, however, generally used, of driving a stake through their bodies, is a practice, as it is said, which hath no countenance from the coroner's warrant.

The *Athenian* law, which ordained, that they who were *felos de se* should have the hand cut off which did the murder, and that it should be buried in a place separate from the body, does not seem to be so suitable and effectual as our own.

The forfeiture, however, in this species of offence, is attended with a cruelty and injustice to individuals, without tending to any public benefit.

S E C T. III.

Of Forfeiture in Felo de se.

A *Felo de se* forfeits all his goods and chattels, real and personal, which he hath in his own right; and all such chattels real, as he hath jointly with his wife, or in her right. He likewise forfeits bonds or things in action belonging solely to himself, and all entire chattels in possession.

By the laws of *Scotland* likewise, the moveables (or personal estate) of a *felo de se* are confiscated.

As to lands of inheritance, he does not forfeit them, not being attainted in his lifetime.

S E C T. IV.

Reflections on Forfeiture in Felo de se.

TO what end, in a crime of this nature, can such forfeitures avail? What advantage can the public derive from this severity, which falls on the innocent? Is it not enough for a wife and children to lose a husband and a father, by a death attended with such shocking circumstances, without suffering for his guilt, and being reduced to beggary by the sentence of the law?

Is it to be supposed, that a man weary of his being, will be deterred from self-murder by the consideration of such forfeiture? Will it not rather induce him to devise means for concealing the real cause of his death, and make that seem accident which is in fact design?

If we consult the feelings of human nature, we shall find reason to conclude that no motive whatever can engage the wretched,

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who are tired of their lives, to exist for the sake of others,

To those who are reduced to that deplorable state, wife and children, however dear, are painful objects. Every thing around them aggravates their infelicity, and every blessing loses its relish.

C H A P. V.

S E C T. I.

Of the Murder of another.

THIS kind of Murder consists in the unlawfully killing another, with malice fore-thought. As to the nice circumstances and distinctions attending this crime, they are foreign to the proposed design of this essay. There are many niceties respecting the presumptions implying malice, and many other points, for which we refer the curious to *Coke, Hale, Hawkins, &c.* and proceed to the Judgment in case of Murder,

S E C T.

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S E C T. II.

Of Judgment in Murder.

BY our Law, the Judgment in case of Murder, and of all capital felonies, is, that the criminal shall be hanged until he be dead.

S E C T. III.

Of the Laws of other Countries, Ancient and Modern, in case of Murder.

BY the Laws of most civilized nations, both ancient and modern, Murder has been justly punished with death.

By the *Egyptian* Laws, he who wilfully killed any person, whether Freeman or Slave, was condemned to die. The Laws

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of *Egypt*, however, went farther in providing for the security of the subject's life, than any other we read of; For he who saw another killed, or violently assaulted on the highway, and did not endeavour to rescue him, if he could, was punished with death. If it appeared that he was unable to give assistance, he was nevertheless obliged to discover and prosecute the offenders according to Law; which, if he neglected, he was doomed to receive a certain number of stripes, and was kept without food for three days.

By the Laws of *Athens*, Murderers and housebreakers were tried before the *Areopagites*, and punished with death. Their counsel was not allowed even to make a preliminary apology, to speak any thing foreign to the cause, or to urge any motives to excite compassion,

Nevertheless, so great was the lenity of their laws, even with respect to this most heinous crime, that the prisoner was permitted to make his defence in two orations,

delivered by himself, or, in later times, by his counsel; and if, after the first oration, he was diffident of the event of the cause, he was allowed to secure himself by flight, and go into voluntary banishment; and if he availed himself of this privilege, his estate was confiscated and exposed to sale by the *Πωληται*.

By the *Roman* Laws likewise Murder was punished with death.

It is observable, however, that in the infancy of the *Roman* commonwealth, we do not find that Murder was, by Law, capitally punished. Indeed, in the infancy of most States, especially in those formed for, or attempting conquests, Murder is seldom distinguished as a capital crime.

A savage behaviour, and unrelenting ferocity, is the chief virtue of such military adventurers. Every man is taught to depend on his own prowess, for the security of his person and property. Upon any violation of his rights, he is left to prosecute

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cut private revenge, to the utmost extent of his power.

The Law, therefore, at such uncivilized periods, takes no cognizance of offences done to individuals. To wrest private revenge, the darling privilege of unpolished minds, from the hands of the injured party, would then have been deemed a species of injustice. Among men who live by blood and rapine, there is in such cases no room for the interposition of the magistrate.

It was not till the manners of mankind were softened by the arts of peace, and that the obligations to industry taught them a more close and intimate connection with each other, that they became sensible of surrendering the right of private revenge.

This is the reason why Murder was not capital among the barbarous nations that overran the western empire. Held together by no other ties than that of partnership in rapine, they were strangers to the more refined social connections. Every man

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man measured the equity of his claim, by the power he had to pursue it; and, when injured, every man was his own avenger. His resentment alone dictated the proportion of punishment; and if, on the slightest, or without any provocation, he committed Murder, a pecuniary composition atoned for the offence.

SECT. IV.

The same Subject continued.

BY the Jewish Law, Murder was not only punishable by death, but avengers were appointed to punish the Murderer wherever they found him; and they suffered the criminal to be torn from the most venerable sanctuaries to undergo punishment; expressly forbidding both the avengers and the judges to make any composition, or accept of any recompence for the crime.

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The *Jews* had likewise another institution, extremely proper at that time, to inspire the people with an extraordinary horror against wilful Murder; which was the expiation of an uncertain Murder; by which the Elders of the next city to the person slain, were to offer an heifer by way of atonement, to cleanse the land from blood.

By the *Persian* Law, Murderers, more particularly poisoners, were pressed to death between two stones.

By the Laws of *China*, Murder is punished with death, according to the nature of it. If a man kills his adversary in a duel, he is strangled, which is reckoned the lesser punishment; if by assassination, or with any aggravating circumstances, he is beheaded, which is deemed more dishonourable.

The Laws of *Scotland*, with respect to Murder, are somewhat analogous to our own,

own, being punished by death, and confiscation of moveables.

But there is a species of Murder unknown to our Laws, which by those of *Scotland* is punished as a treasonable offence, which is *Murder upon trust*; that is, where the party murdered put himself under the trust or confidence of the slayer; in which case the crime is punished as Treason.

Poisoning, likewise, by the *Scotch Law*, is declared to be punishable as the crime of Treason.

The crime of poisoning was formerly so odious in this kingdom, that by act of parliament of *Hen. VIII.* it was made High Treason, and punished by a more grievous and lingering death than the Common Law ordained, viz. That the offender should be boiled to death in hot water. Upon which Statute, *Margaret Davy*, a young woman, was attainted of High Treason, for poisoning her mistress; and some

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some others were boiled to death in *Smithfield* on the 17th of *March*, in the same year. But this act was too severe to live long, and therefore was repealed by 1 *Edw.* VI. chap. 12. and 1st *Mar.* chap. 1.

It is worthy of observation, that, by the ancient Law of *Scotland*, the king could not pardon for Murder, unless the offender agreed to assist the party, which assistance being in the nature of a composition, was modified by the council; and when the Murderer was taken *red hand*, that is, apprehended in the act, the Sheriff was to try and execute within three suns.

With regard to our Laws, the crime of Murder, in the old feudal times, was atoned for, as has been observed, by composition.

The Saxons punished Murder only with a fine, according to the old rule, *lurtur homicidium certo armentorum & pecorum numero*: and what was still worse, they countenanced that, which, in after ages, was

was called *deadly feud*; and so under colour of punishing Murder by revenge, they added blood to blood.

But as times grew more civilized, and as Religion gained ground, the nature of this crime was better understood, which brought on the Law of Appeals, and so private revenge came under the power of the Law, which punished death with death. The good king *Alfred's* zeal against Murder first caused it to be capitally punished.

Our rude forefathers, however, as well as we, distinguished the different degrees of bloodshed, and made a difference in the punishment. One kind they considered as springing from sudden passion; another from forethought and purpose, which they called *Abere Murder*, or Murder by foreplot or treachery; and this was made *nullo pretio emendabile*.

Yet towards the time of the *Danes*, devotion grew so high, that a sanctuary could

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make any bloodshed expiable, if not acceptable, under the golden colour of recompence made to the king, to the lord of the party slain, and to the friends of the party, for the loss of a subject; a tenant, and a friend; according to the custom of their forefathers, as described by *Tacitus*, *recipitque satisfactionem universa domus*.

Their Laws, in this respect, underwent many changes, too tedious to recite.

In former days, Murder signified only the private killing of a man, as appears by the Laws of *Hen. I.* And it was not Murder, some say, except the party slain was an *Englishman* and no foreigner; though by the Statute 14 *Edw. III.* chap. 4. the killing of any *Englishman* or foreigner, living under the king's protection, through malice prepense, and whether committed openly or secretly, is Murder: And without doubt the makers of the Statute of 23 *Hen. VIII.* which excludes all wilful Murder from the benefit of Clergy, intended

tended to include open as well as private Homicide within the word *Murder*.

SECT. VI.

Reflections on the Judgment in case of Murder.

IN case of Murder indeed it is both just and reasonable to doom the criminal to death; because, by his crime, he has put it out of his power to make any kind of compensation to the party slain.

The bare execution of the criminal, however, does not sufficiently satisfy the claims of justice. Justice requires not only that punishment be inflicted on the offender, but that all possible reparation be made to the surviving friends and relations, who are injured by the death of the party slain.

This therefore is one of those crimes in which forfeiture is justifiable. It may,

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and does often happen, that a helpless family derived its whole support from the party slain; and it is reasonable, where the Murderer is a man of property, that they should be intitled to recompence out of it.

In the most rude times, the injury done to the friends and relations of the party slain, has always been considered in the punishment of the offender. *Bromley*, in his argument of *Pledall's* case, to shew what effect the consideration of blood and kindred had in our Law, affirms, that when, in an appeal of Murder, the appellant was found guilty, the old custom was, that all the blood of the party murdered, used to draw the Murderer by a long rope to his execution; which usage he supposes to be founded on the affection which they were all presumed to bear towards the party slain.

But our Law regards Murder as a crime committed to the prejudice of the State, and takes no notice of the interest of the friends and relations of the party slain, as will

will appear from the consideration of the next head.

S E C T. VI.

Of Forfeiture in case of Murder.

WITH respect to Forfeiture in case of Murder, it is in that, and in all capital felonies, as in High Treason. Lands and tenements are forfeited upon attainder, and goods and chattels upon conviction; with this difference, that in felony, entailed lands are forfeited, only during the life of tenant in tail; and that in felony the wife is dowable, which in High and Petit Treason she is not.

S E C T. VII.

Reflections on Forfeiture in case of Murder.

WE find that the Law respecting Forfeiture, pays no regard whatever to the friends and relations of the party slain, though perhaps they may be beggared by his death.

Our Law, in this, as in many other cases, has started from one extreme to the other. In the rude times of ignorance, as has been shewn, the recompence to the kindred of the party slain, was the sole consideration; their notions of policy were not sufficiently enlarged to comprehend the injury done to the State.

In our times the ideas of public interest are so refined, that by making provisions solely for the benefit of the State, we are guilty of injustice to injured individuals.

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Reason and equity however pronounce, that the kindred of the deceased, who are sufferers by his death, should be sharers in the Forfeiture incurred by the delinquent. Nevertheless, neither reason or justice requires, that we utterly ruin one innocent family to redress another.

The Forfeiture therefore in this, and in all other cases, might be only of a moiety of the delinquent's property; one-fourth of which moiety should be appropriated to the Fisk, and the remainder to the friends and relations of the party slain.

C H A P. VI.

S E C T. I.

Of Man-slaughter.

MAN-SLAUGHTER is defined to be the killing of another without malice, in a present heat, on a sudden quarrel, upon a just provocation; or in the commission of a voluntary and unlawful act, without any deliberate intention of doing mischief.

If two people meet together, and in striving for the wall, one of them kills the other, this is Man-slaughter; and so it is, if, upon a sudden occasion, they had gone into the fields and fought, and one had killed the other; for all this is one continued act of passion, on the first sudden occasion.

Nothing

Nothing however can be inferred from hence in vindication of duelling; which is a fighting between two upon a quarrel so long precedent, that it may be presumed the blood was cooled; and in case of duelling, not only the principal, who actually kills the other, but also the seconds, are guilty of Murder, whether they fought or not; and the seconds of the person killed, it is said, are equally guilty by reason of the encouragement which they gave their principals by joining with them.

By the *Scotch* Law, both the challenger and challenged are punished with death and confiscation of moveables; and the challenger is liable to such arbitrary punishment as the king thinks fit.

In the Laws of *Canutus*, as well as among the *Saxons* before-mentioned, it appears that the same distinction was made between Murder and Manlaughter as prevails now; for we find, that if a man was killed wilfully and premeditatedly, then
the

the offender was to be delivered to the kindred of the slain; but if, upon his trial, the fact was proved not to be wilful, then he was resigned to the bishop, &c.

S E C T. II.

Of the Judgment in Manslaughter.

IN cases of Manslaughter, the criminal is to be burnt in the hand.

S E C T. III.

Reflections on Judgment in Manslaughter.

IT is observable, that originally the burning in the hand was not intended as part of the Judgment by way of punishment, but only that the criminal might be known on the second offence.

At common-law a criminal might have had his clergy *ad infinitum*; but when the statute

statute was made, which took away the benefit of the clergy upon the second arraignment, the burning in the hand became necessary to distinguish the criminal.

S E C T. IV.

Of Forfeiture in Manslaughter.

WITH regard to the Forfeiture, more may be said in vindication of it, in case of Manslaughter, than in most other offences; because, in case of Manslaughter, the offending party is in being, consequently he suffers for his own offence.

Yet, even in this instance, the law perhaps might admit of improvement: an improvement too, which we may borrow from the barbarous nations. The old practice of making atonement by way of fine and composition, seems to be particularly applicable to this species of offence.

The killing of another, though without malice, is an injury done to the kindred of
the

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the deceased, as well as a prejudice to the state. Though there may not, philosophically speaking, be any immorality in the act, as not being done with a deliberate intention of doing mischief, yet the good of society requires that such excesses of passion should be restrained, and that men should be punished for assuming a right of private revenge.

No punishment seems to be more properly adapted to offences of this kind, than the loss of property. But reason and justice seem to require, that three-fourths of the forfeiture in this case should be applied to the use of the kindred of the person slain, by way of composition, and the remainder to the public treasury; and forfeitures in former times always were divided.

Having said thus much of Murder and Manslaughter, which are properly called *voluntary homicides*, the *involuntary homicides*, such as those by *chancemedley* and necessity, come next under consideration.

C H A P,

C H A P. VII.

S E C T. I.

Of Chancemedley.

3. **C**HANCEMEDLEY, is when a man is doing a lawful act without intent of hurt to another, and the death of some person doth by chance ensue.

S E C T. II.

Of the Judgment in Chancemedley.

FOR this offence, the offender has his pardon of course.

S E C T. III.

Of Forfeiture in Chancemedley.

THE rigour and injustice of the forfeiture in this case is very observable, as the offence is unattended with the least

degree of blame in the offending party. Where, indeed, there are any circumstances of carelessness, it is proper that the offender should be punished.

For instance, if a workman flings rubbish from off a house, and gives warning to all persons to stand out of the way ; yet if he kills a person underneath, he ought to suffer, because there was a degree of negligence in not making himself certain that there was no one within the reach of danger, and it is but just that every man should be punished for the consequences of his negligence.

In this case therefore, it is reasonable that he should incur a forfeiture: three-fourths of which, however, as in the former instances, should be appropriated to the kindred of the deceased, and the remainder to the state ; for the kindred of the slain are more injured by the loss of their relation, than the state is by the loss of a subject.

But where chancemedley is attended with no negligence in the party doing the mischief ;

8 chief;

chief; as where a man riding a horse on the street, and a stander-by whips the horse, by which means he runs over a child, or other person, and kills it; in this case, as there is no carelessness in the rider, such chancemedley should not be punished with forfeiture of goods and chattels.

Some slight atonement, in the nature of a deodand, would be sufficient to shew, that the state interests itself in the preservation of the subject.

CHAP. VIII.

SECT. I.

Of Homicide by Necessity.

4. **T**HIS Necessity makes Homicide excusable or justifiable.

1. Excusable homicide is committed *se defendendo*, where one has no other possible means of preserving one's own life than by killing the person who reduced him to such Necessity.

It

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It is observable, that a man could not, by our ancient laws, draw a weapon *even in his own defence* in a church or church-yard, or in view of the king's courts of justice, or in any of the king's palaces: as no one is to be armed in these places.

But such a construction of law, which opposes the primitive law of nature, by which men are directed towards self-preservation, is highly unnatural and absurd.

No place can be so sacred as to deprive a man of his right of self-defence, and oblige him to yield himself a tame sacrifice. Such passive conduct would, in fact, make him criminal in the highest degree; for, should he neglect to defend himself, he would become a *felo de se*.

The law of nature, which dictates self-preservation, is so powerful, that it supercedes all other laws, and an attempt to restrain it is absurd and inefficacious.

2. Justifiable Homicide is either *public*, and done in the execution of public justice; or *private*, in defence of one's person, house

house or goods: as when a woman kills one who attempts to ravish her, or when one kills another attempting to murder him or rob him, abroad or in his own house.

But if the assault in the house were in the day-time, not to rob, but to beat another, it would be a killing *se defendendo*.

Upon the special matter found in case of justifiable Homicide, the party is to be dismissed without any forfeiture or pardon purchased.

SECT. II

Of Judgment and Forfeiture in Se Defendendo.

THE Judgment and Forfeiture in *Se Defendendo* is the same as in chance-medley, and liable to the same exceptions.

Indeed, it seems uncommonly absurd and unjust, to make a man forfeit his goods and chattels for acting in conformity to the

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first law of nature, which dictates self-defence. The expiation of uncertain murder among the Jews, was grounded on reason, but there is no reason whatever for such rigour in cases of self-defence.

CH A P. IX,

Of private Felonies against the Body of the Subject.

PRIVATE Felonies against the Body of the Subject may be committed,
1. By sodomy. 2. By rape. 3. By forcible marriage or defilement of women.
4. By polygamy. 5. By maihem.

All these offences (polygamy excepted) are capital; but perhaps in some of them milder punishments might more effectually prevent the perpetration of such shocking crimes.

SECT.

S E C T. I.

Of Sodomy.

1. **W**ITH respect to the first, which is of such an unnatural and abominable nature, that it is difficult even to credit its existence, the severity of the punishment does not seem calculated to diminish the frequency of the offence, though by the laws of most nations, ancient and modern, it has been capitally punished.

Of the laws of other nations in Sodomy.

Among the *Grecians*, the punishment of this abominable vice was sometimes discretionary, and at other times punished with death.

Among the *Romans*, by the *Scotania Lex*, the penalty was only pecuniary, but it was afterwards made death.

By the *Jewish law* it was punished with death.

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By the law of *France* the offender suffers death by burning.

By the law of *Scotland* it is punishable by death.

It does not appear, that by the common law of *England* this detestable sin was capitally punished. We read that in the time of *Edw. III.* a complaint was made in parliament, that the *Lombards* had brought this shameful sin into the realm.

Our ancient authors, says Lord *Coke*, conclude that it merits death, *ultimum supplicium*, though they differ in the manner of inflicting it.

Briton says, that sodomites and miscreants shall be burned, as they were by the judgment of Almighty God.

Fleta saith, *Pecorantes et Sodomita in terrâ vivi confodiantur*; and, with this punishment, the *Mirrour* agrees, *pur le grand abomination*. And in another place, he saith,

faith, *Sodomie est crime de majesté vers le roy celestie.*

In ancient times, the man was hanged for this offence, and the woman was drowned, of which we find examples in the reign of Rich. I. And this explains the ancient franchises *de furca et fossa*, of the gallows and the pit, for the hanging upon the one, and drowning in the other.

But *fossa* is taken away, and *furca* remains; and, at this time, the judgment in all cases of felony is, that the person attainted shall be hanged by the neck, until he or she be dead.

This crime is expressly forbidden in holy writ; *cum masculino non commiscearis coitu femineo, quia abominatio est. Cum omni pecore non coibis, nec maculaberis cum eo. Mulier non succumbet jumento, nec miscetur ei, quia scelus est, &c.*

The act 25 Hen. VIII. hath adjudged it felony, and hath taken away the benefit of clergy from the delinquent.

Women are within this statute, and if they commit this crime with a beast, incur the same punishment; and the word *person* was used in the act to extend it to them. This extension was thought more essentially necessary, as some time before the making of this act a great lady had been guilty of this abominable bestiality with a baboon, and had conceived by it.

SECT. II.

Of Rape.

2. **W**ITH regard to Rape, the offence being capital, our tenderness for life makes the law require such strong evidence of the crime, that the proof is extremely nice and difficult, and the law therefore, in some measure, useless: whereas, was it more mild, it would be more efficacious, and the violation of chastity would be easier prevented.

By the law of *Egypt*, Rapes were punished by cutting off the offending parts.

By

By the *Athenian* laws, he who ravished a virgin was obliged to marry her. By one of *Solon's* laws, he who committed a Rape was fined one hundred drachms; and, by a subsequent law, this penalty was doubled.

It was a long time before this crime was punished capitally by the *Roman* law; but, at length, by the *Lex Julia*, the penalty of committing a Rape with force was made death.

In like manner, by the *Jewish* law, a forcible Rape was punished with death; but if a man deflowered a virgin without force, he was to pay her father fifty shekels of silver, and to marry her, without having it in his power to put her away during his life.

By the law of *Scotland*, Rape is punishable with death, and confiscation of moveables: anciently, in this kingdom, Rape was felony, and punished with death, especially if the party ravished were a virgin; unless such virgin would accept of the offender for her husband, in which case she

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might save his life by marrying him; for, if she demanded him for her husband before judgment passed, he escaped punishment.

But by the Stat. *Westm.* 2. her election is taken away. Afterwards the crime of Rape was considered as a great misdemeanor only, and not as a felony; but it was nevertheless dreadfully punished, by the loss of eyes and privy members, as we read in a law of *William the Norman*, *Si quis aliquam vi oppressisset, genitalibus privabitur armis.*

By the Stat. of *Westm.* 3 *Edw.* I. c. 13. it was reduced to a trespass, subjecting the offender to two years imprisonment, and a fine at the king's will; but the Stat. *Westm.* 2. c. 34. made it felony again; and by the 18th *Eliz.* it is excluded from the benefit of the clergy.

Though this offence is of the most heinous nature, and, if tolerated, would be subversive of all order and morality, yet it seems highly impolitic to punish it with death.

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death. Atrocious as it is, yet it has its root in a propensity natural to man; and the irregular and inordinate gratification of unruly appetite, to the injury of individuals, and the prejudice of society, may be properly punished, without destroying the offender.

The most natural punishment seems to be that of compelling the criminal to marry the injured party; and this should be exacted in all forcible violations of female chastity, and even in all cases of seduction without force, where the seducer shall afterwards abandon and desert the partner of his guilt.

But where the injured party shall refuse to marry the offender, in that case the criminal ought to be severely punished by fine, and confinement to real hard labour.

S E C T.

S E C T. III.

*Of forcible Marriage, or Defilement
of Women.*

3. **O**F forcible Marriage, &c. it is observable, that by confining the offence to women of estate only, moral principles are made to yield to political considerations; and the security of property is deemed more essential than the preservation of female chastity.

By the Stat. 3. Hen. VII. c. 2. it is enacted, that if any person shall take away any woman, having lands or goods, or that is heir apparent to her ancestor, by force and against her will, and marry or defile her, the takers, procurers, abettors, and receivers of the woman taken away against her will, and knowing the same, shall be deemed principal felons; but as to procurers and accessories, they are, before the offence committed, to be excluded the benefit of clergy by 39 Eliz. c. 9.

This act we find makes the property of the woman the measure of the crime. But in reason and nature, the forcible Marriage or Defilement of a woman without any estate, is, undoubtedly, as criminal as the forcible Marriage or Defilement of a woman who is heir apparent to the inheritance of a whole county.

It is true, that the offence is most likely to be committed to such, as their fortunes alone are sufficient temptations to this violence. But if the law had been made general, their security would have been included, and the principles of morality would not have been violated by the distinction.

As to those who argue, that the immorality of an act is not so much to be considered as its bad tendency, their objections have been already answered.

It is, however, highly impolitic, and unreasonably severe, to punish these offences with death. In case of Defilement, the same punishment might be inflicted as is above proposed with respect to rape. But
in

in case of forcible Marriage, if, besides dooming the offender to the penalty of the fine, and confinement to hard labour, it might be provided that the estate of the woman so forced should be vested in a court of equity in trust for her separate use, and her husband never to intermeddle therewith; such a provision would, probably, in most instances, prevent this crime, as it would take away the temptation which moves the offenders to the commission of it.

S E C T. IV.

Of Polygamy.

4th **W**ITH respect to Polygamy, it is an offence created by the Statute of James I. and is thereby declared felony, but not excluded from the benefit of the clergy. This, though at first it appears only a political offence, is, in truth, a breach of religious and moral virtue in the highest degree.

In the early times of Greece, indeed, Polygamy was tolerated; and *Cecrops* was the first who made a law, that no man should have more than one wife.

We do not find, however, that this institution was rigidly observed throughout Greece. Even in *Sparta*, where, for some time, it prevailed most strictly, we read that *Alexandridas* had two wives; and, in many parts of Greece, upon some emergent occasions, as when their men had been destroyed by war or other calamities, Polygamy was tolerated: Of which we have an instance at *Athens* in the time of *Euripides*, who, it is said, conceived a mortal hatred against the whole sex, on account of his having been harassed by two wives at once.

Socrates likewise is said by some to have been married to *Xantippe* and *Myrto* at the same time: Though, it must be confessed, this fact is controverted by others; and, in the opinion of *Plutarch* in particular, thought to be false. It is likewise reported, that *Socrates* lent his wife *Xantippe* to *Alcibiades*.

It

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It is observable, however, that one of *Solan's* laws seems to have countenanced Polygamy, or, more properly, to have instituted a kind of licensed adultery. For if an heiress could not conceive children by her husband, she might admit the embraces of her husband's nearest relation.

What the punishment of Polygamy was among the *Gretians*, does not appear. It was probably arbitrary, as we do not find any positive penalty settled by law.

Among the *Romans* likewise, we do not meet with any positive law against Polygamy; on the contrary, it is said to have been a custom among them for wives to marry more than one husband; and every one knows the story of *Cato of Utica*, who, to oblige his friend *Hortensius*, gave up his wife *Martia* to him; and not only suffered him to marry her, but actually assisted at the ceremony himself, together with *Philip*, the father of *Martia*. This story is, however, by *Plutarch*, considered as romantic.

Among

Among the Jews, Polygamy was tolerated; and we learn from the sacred writings, that *Lamech* was the first who took two wives.

By the law of Scotland, Polygamy, which the Scotch with greater propriety call Bigamy, is punished only with confiscation of moveables, and an incapacity of holding any office.

Ever since the institution of matrimony under the present form, Polygamy must have been allowed to be criminal, had no statute been made to prohibit it. It is true, among our ancestors in this kingdom it was formerly no crime. We read that our *British* forefathers had sometimes twelve wives in common, but the children were reputed to belong to him who first trespassed on the maid's virginity: and we are told that *Theomantius*, an ancient *British* king, being censured by parliament for leaving his *Scotish* queen, and marrying the daughter of *Clodius Caesar*, answered, That he did not know it was unlawful for him to have
more

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more wives than one; *eo quod leges Britannorum hucusque id nunquam prohibuissent*, for that the laws of Britain had not yet forbidden it.

Marriage, it must be allowed, on the footing of its present institution, is an engagement of the most solemn nature, and the sacred pledge of mutual constancy given at the altar, cannot be violated by any who have a due sense of religion and morality. It is therefore highly just, that the law should punish such violation; but it must be confessed, that there is great difficulty in pointing out the most effectual means of answering the purposes which the law ought to have in contemplation in this respect.

If the offending party be the husband, and he has any property to forfeit, does it not seem just and expedient that a great part of it should be allotted to the separate use of the innocent wife; or, in case he derives that property from his marriage, that it be refunded to the wife. Again,

If the wife be the offender, and possessed of property, which the Law vests in the husband, might not the guilty wife be punished with imprisonment, and a less allowance for provison, &c. than her rank and condition intitled her to? And in all cases where the offenders have no property, might they not be obliged to labour for the benefit of the injured parties, as likewise for a fine to the Fisk?

SECT. V.

Of Mayhem.

5. **W**ITH regard to Mayhem, indeed, the Law does not appear to be too severe: For in the Statute which makes it capital, there is a just and prudent proviso, that there shall be no corruption of blood, loss of dower, or of lands, goods, or chattels, of the offender.

The Statute respecting Mayhem is 5 Hen. IV. chap. 5. Before the making of

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this act, says lord *Coke*, when any one had been beaten, wounded, maimed, or robbed, &c. the mildoers, to the end that the party aggrieved might not be able to accuse them, did cut out their tongues, or put out their eyes, on pretence that the same was no felony.

To prove malice in this crime, the act must be voluntary and of set purpose, though done on a sudden occasion; and then the Law will imply malice.

We read in *Bracton*, that the cutting off a man's privy members was felony by the Common Law: For he saith, *Quid dicitur si quis alterius virilia absciderit, et illum libidinis causa, vel convitii castraverit? Tenetur siue hoc volens fecerit vel invitus, et sequitur pena aliquando capitalis, aliquando perpetuum exilium, cum omni bonorum ademptione.* *Fleta* saith, *Siquis castrata fuerit, talis pro mahemato poterit adjudicari.*

With this account, old Justice *Sennal*, in the *Mirror*, agrees, and so the Law is held

held to be at this day; and in the appeal and indictment of Mayhem, it is said, *felonice mayhemavit*. Cutting off ears is no felony, as appears by the Statute 37 Hen. VIII. vide *Staundf. pl. coron. cap. 27*. The offender shall have the benefit of his clergy, 3 *Inst. ch. 13*.

C H A P. X.

Of Private Felonies against the Goods of the Subject.

PRIVATE Felonies against the goods of the subject may be committed, by 1.

Simple Larceny. 2. *Mixt Larceny.* 3. *Piracy.*

S E C T. I.

Of Simple Larceny.

1. **SIMPLE Larceny** is of two sorts.

1. *Grand Larceny.* 2. *Petit Larceny.*

1. *Grand Larceny* is a felonious and fraudulent taking and carrying away, by man or woman, the mere personal goods of another, above the value of twelve-pence; not from the person, or by night in the house of the owner. This offence is capital.

2. *Petit Larceny* is where the goods stolen do not exceed the value of twelve-pence. If one is indicted for stealing of goods of the value of forty shillings, and the jury find specially, as they may, that the value is but ten-pence, it is but *Petit Larceny*, punishable with forfeiture of goods and chattels, transportation, whipping,

ping, or other corporal punishment. Petit Larceny is felony, though not capital, and agrees with Grand Larceny in every thing but the value of the goods stolen, which makes the difference of punishment,

Thus we find, that by the rigour of our Law, the stealing of the least trifle, above twelve-pence, subjects the offender to loss of life; which seems repugnant to common sense and reason; especially if we consider, that when this *Anglo-Saxon* Law was made, in the time of *Atbelstan*, twelve-pence was equivalent to more than three pounds now; and yet a theft, above the value of twelve-pence, is still liable to the same punishment; upon which Sir *Henry Spelman* justly observes, that while all things have risen in their value and grown dearer, the life of man is become much cheaper.

From hence that learned Author takes occasion to wish, that the ancient tenderness for life was again restored in the words of the motto. *Iustum certe est ut collapsa legis equitas restauretur & ut*

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*divina imaginis vehiculum, quod superiores
pridem etates ob gravissima crimina nequa-
quam tollerent levioribus hodie ex delictis
non perderetur.*

Of the different Punishments of Theft.

It appears that among many well ordered governments, the crime of Theft was not capital. Among the *Egyptians* there was a remarkable Law, or rather custom, which had the sanction of Law, with regard to robbers and sharpers. Whoever entered himself of their gang, gave his name to the chief, promising to deliver to him all the booty that he should from time to time purloin. On this account, it was customary for such as had any thing stolen from them, to apply to the chief of the gang, and give a more particular account and description in writing of what they had lost; as also of the day, hour, and place, when and where they had lost it. This information being given, the stolen goods were easily found, and restored to the right owner,
upon

upon his paying a fourth part of the value.

The institutors of this extraordinary Law, probably thought, that since it was impossible to prevent thieving entirely, it would be more tolerable for the injured party to lose a fourth, by way of redemption, than the whole.

Though Theft however was tolerated among them under this form, yet they who refused, or neglected to give in their names, were severely punished for any unlawful acts. By their Laws, every *Egyptian* was enjoined to give in his name, and by what means he gained his livelihood, in writing, to the governor of the province where he lived. But if it could be proved, that he had given in a wrong information, or that he gained his living in an unlawful way, he was punished with death. This Law was made by *Amasis*; and *Solon*, who introduced it among the *Athenians*, is said to have borrowed it from the *Egyptians*.

Of the Athenian Laws in Theft.

By the Laws of *Athens*, he who was guilty of Theft, was to pay double the value of the thing stolen to the owner, and as much to the public Exchequer.

If any one stole any thing by day, worth above fifty drachms, the action *Αναλωγή* was prosecuted against him before the *Oi Evidenciæ*, or the eleven; but if in the night, any person was allowed to kill him, or, upon his endeavouring to escape, to wound him, and to commence a prosecution against him, by which, if he was condemned, he was to die without any liberty for sureties to put in bail for the restitution of the stolen goods.

To pilfer any thing of the least value out of the public temples, was death. Likewise all cutpurves, burglars, and kidnappers were to suffer death.

He

He who cast a man into prison for theft, and could not prove it upon him, was fined a hundred drachms.

By the Laws of *Draco*, however, which are deservedly stigmatized for their severity, Theft, with other lesser offences, was death.

There was a Law likewise of *Solon's*, which made it death to steal figs: But as the Annotator on Chief Justice *Hale* observes, this was a temporary Law, made in time of dearth, when it was thought necessary to prohibit the exportation of figs. However, prosecutions of offenders against this Law, soon grew odious; and from hence all malicious informers were called sycophants.

Solon, however, afterwards changed the punishment for Theft to the payment of a fine.

By the Laws of *Plato*, in his Republic, a Thief was to pay double the value of the thing stolen.

Among

Among the *Lacedemonians*, however, Theft was, in a great measure, connived at and permitted; and it was reckoned a perfection to be dexterous in pilfering, which, as they imagined, had a tendency to instruct the youth in the stratagems of war.

Of the Roman Law in Theft.

By the *Lex Julia*, Theft was punishable at discretion.

The *Romans*, as the Annotator on Chief Justice *Hale* observes, were so far from inflicting capital punishments for Thefts, that, on the contrary, it was expressly forbidden by *Justinian*, that any person should be put to death, or suffer the loss of member for Theft,

By the *Roman Law*, a *furtum manifestum* was punished by an *actio in quadruplum*; but where it was not *manifestum*, by an *actio in duplum* only.

By

By a *manifest Theft* was meant, not only that wherein the Thief was taken in the fact, but also where he was apprehended with the goods upon him, before they were carried to the place where they were to remain that night, and answers to the expression in our Law, of being taken in the *mainouvre* or *mainer*.

It appears, therefore, that among the *Romans*, the greatest punishment of Theft, was fourfold restitution.

Of the Jewish Law in Theft.

Among the *Jews*, the stealing of a man was the only capital Theft under the Law of *Moses*, and whether the stolen persons were sold, or were still in the possession of the Thief, he was to be put to death. All other Theft was punished by fourfold restitution, and the addition of a fine, according to the nature of the Theft.

But

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But a man who broke into the house at night to rob, might be killed with impunity, though not in the day-time.

If the Thief had not wherewith to make satisfaction, according to the Law, it was lawful for the prosecutor, if he was an *Israelite*, to sell him; but not if he was a proselyte of any kind; neither could the former sell him to any but an *Israelite*. If he had wife and children, they likewise might be sold with him, till satisfaction was made to the offended.

Of the Law of China in Theft.

By the Law of China, Theft, unless aggravated by circumstances, is not capital, but the offenders undergo the bastinadoe.

If the Theft is of an atrocious nature, the criminal is condemned to the knoutage, or wooden ruff, something like our pillory.

Of the Law of Scotland in Theft.

By the *Scotch Law*, as with us, Theft is in some cases punished with death. But by the Law of *Burdenfack*, no man shall suffer for taking so much meat as he can carry on his back; but Theft committed by men of landed estate, or in the night, or attended with violence, is by their Law punished with death.

This distinction of the *Scotch Law*, between a Theft committed through pressing necessity, and one done from rapacity or other bad principle, is founded on good sense, and is worthy of being copied; for it is certainly just and politic to distinguish between acts of necessity, and acts of injustice.

Among the ancient *Spaniards*, as we learn from *Covarruvias*, a Thief was not executed but for the second Theft. The *Spaniards* used to cut off the hands and ears of Thieves.

of

Of the ancient Laws of this kingdom in Theft.

Our ancestors, the *Saxons*, did not at first punish Theft capitally. The *Germans* however differed with respect to the punishment of this offence. The *Saxons*, at one time, punished it with death, but the *Angles* with fine only. But King *Ina* made it capital, and *Canutus* followed his example.

By the Laws of *Ina*, a Thief might redeem his life, *capitis estimatione*, which was sixty shillings. But if a villain, who had been often accused, was taken in a Theft, he was to have a hand or a foot cut off.

By *Alfred's* Laws, whoever stole a mare with foal, or a cow with calf, was to pay forty shillings, besides the price of the mare or cow. Whoever stole any thing out of a church, was to pay the value, and also to have that hand cut off which com-

mitted the fact. If any person committed a Theft, *die dominico*, or on any other great festival, he was to pay double.

By the Laws of king *Athelstan*, a Thief who was upwards of twelve years of age, and stole more than the value of twelve-pence, was punished with death. By the first Law of this king, the limited value was but eight-pence. But by his Laws enacted afterwards at *London*, and thence called *Judicia Civitatis Londonie*, no one was to be put to death for a Theft under twelve-pence. In case however that the Thief fled, or made resistance, then he might be put to death, though it were under that value.

According to some, *Edmund* his successor, or, as others contend, *Athelstan* himself, by a subsequent Law, enlarged the age of the delinquent to fifteen years. And *Edward* the Confessor restrained the capital punishments to Thefts of twelve-pence value or above; which prevails at this

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this time, under the distinction of Grand Larceny.

William the Norman, however, ordained, that no one should be hanged or put to death for any offence; but that offenders should be punished with the loss of eyes, castration, or cutting off of hands or feet. And according to *William of Malmfbury*, *Hen. I.* instituted the same Law: But *Florence of Worcester*, and *Roger of Hoveden* say, that Theft was, in their time, punished with death, by hanging, as now; and what we read in *Dugdale's Origines Juridicales* confirms this last opinion; for he says, that *Hen. I.* in the year 1108, the ninth year of his reign, ordered, that, for Theft and Robbery, offenders should be hanged. *Brompton* places this institution in the year 1103.

Selden, however, in his *Epinomis*, mentions, in support of *Malmfbury's* opinion, a miracle reported out of *Fox's Ecclesiastical History*, of one *Edward of King's Weston* in
Bed-

Bedfordshire, attainted in the time of *Hen. II.* for stealing a pair of hedging gloves and a whetstone, and having by execution lost his eyes and genitals, had, through devout prayers, at *Thomas Becket's* shrine, in *Canterbury*, the members and faculties which he had been deprived of, restored to him.

Felons also were formerly beheaded, and it is said, that the first instance of beheading, was that of the Earl of *Northumberland*, in the year 1075 (8 *William* the Conqueror).

Felons, likewise, in former times, were drowned, as appears by an instance of 6 *Edw. II.* where the Jury made a presentment against the Prior of *Christ-Church Canterbury*, for diverting the course of a certain water called *Gesling*, in which felons ought to suffer Judgment, by being drowned.

After the Law of *Hen. I.* for hanging felons, the County Palatine of *Chester*
 D d adhered

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adhered to the custom of beheading them; and the Justices of the Peace in that county received twelve-pence from the king for every one beheaded by their officers.

The *Goths*, according to some, were the first who ordered Thieves to be hanged. It is to be wished, however, that, in these days of refinement, such savage and *Gothic* institutions were abolished, and that we copied the more just and mild system which Reason and Religion recommend.

The Sacred Law makes a distinction in the punishment of Theft and Murder. The latter was justly deemed so capital, that the avenger of blood and the Judges were expressly forbidden to make any composition, or to accept of any recompence for the crime; and the murderer was excluded from all hopes of mercy.

Our Law therefore is more mild in cases of Homicide than the Sacred Law, at the same time that it is infinitely more severe with respect to the lesser crime of Theft.

The latter, as has been shown, was only punished by restitution, and the addition of a fine, according to the nature of the offence. By this means such offenders were not only obliged to make restitution, but they might afterwards amend their lives.

It may be objected, however, that, in cases of Theft, it is often out of the power of criminals to make restitution; and, among others, the Baron *Montesquieu* has insisted on this objection. He gives it as his opinion, that it may be just to make Theft capital, on account of the inequality of fortunes, which frequently renders delinquents unable to make restitution.

But whenever this happens to be the case, may not the offender be confined to hard work, till by the profits of his labour he has made a recompence to the injured party?

When he has made a reparation to the person injured, he should afterwards be obliged to labour for the benefit of the

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State, for a certain fixed time, according to the nature and degree of the Theft.

Such an institution would be a real security to property; whereas, according to our present system of Laws, the offender loses his life, and they whom he has injured lose their property; the one is excluded from society, and the other remains in it unrecompensed for the injury he has sustained.

It is to be imputed to the severe punishment of Theft, that men of tender feelings conscientiously scruple to prosecute delinquents for inconsiderable Thefts, when they know that death is the penalty of conviction.

Hence it arises, that Pilferers too often escape with impunity, and that property is insecure. The severity of the punishment, which is intended to lessen, contributes to multiply the offence.

S E C T.

S E C T. II.

Of mixed or complicated Larceny.

MI~~XED~~ or complicated Larceny has a farther degree of guilt in it, and is either a taking, 1. from the person of a man, or 2. from his house.

Larceny from the person is of two kinds; of which one puts the party robbed in fear, and the other does not.

That Larceny from the person which puts him in fear, is *Robbery*; which is defined to be a felonious and violent assault upon the person of another, taking from his person, goods or money, to any value, and putting him in fear; though, in an enlarged sense, it signifies any wrongful taking away of goods. *Robbery* is felony without Clergy.

Selden is of opinion, that Robbery and Theft were punished by hanging even in *William the Norman's* time, as he concludes from the following passage: "Let it be lawful for the Abbot of the Church, if he comes in the God-speed, to acquit any Highwayman or Thief from the gallows." These, says he, are the words of the patent with which *William*, to expiate the slaughter of *Harald*, consecrated a Monastery to *St. Martin*, near *Hastings*, on the sea-coast of *Suffex*, and privileged it with choice and singular rights.

By the Law of *Scotland*, likewise, Robbery is punished with death.

Larceny from the person which does not put the party robbed in fear, is either done privately without the party's knowledge, or openly with his knowledge. Privately, and without his knowledge, is by picking the pocket or cutting the purse, and stealing from thence to the value of twelve-pence.

If

If this offence is laid in the indictment pursuant to the 8th of *Eliz.* to be done *clam et secrete*, the offender is excluded from his clergy; if those words are wanting, a private Larceny from the person shall have the benefit of clergy.

The Larceny committed openly, and with the party's knowledge, in his sight and before his face, is, when one takes off another's hat or wig, &c. from his head, and runs away with them, without paying for them, &c. In all those cases of open Larceny with knowledge, the offenders are by the Common Law within the benefit of clergy. But with respect to dwelling-houses, &c. the Common Law has been altered by 12 *Ann. c. 7.* which ordains, That

"If any person shall steal any money, goods, &c. of the value of forty shillings, or more, being in any dwelling-house, or outhouse thereunto belonging, though such house be not broken by such offender, and though any person be or be not in such house, &c. or if any person shall assist an-

other to commit such offence, he shall be debarred the benefit of clergy."

This act, however, does not extend to apprentices under the age of fifteen years, who shall rob their masters.

2. Larceny from the *house*, is a mixed and complicated felony, and debarred of clergy, though it was but simple Larceny at the Common Law. In this offence, clergy is taken away by several statutes.

S E C T. III.

Of Piracy.

PIRACY is a felony against the goods of the subject, by a depredation or robbing at sea. This is a capital offence by the Civil Law; but by act of parliament it is enquired of, heard, and determined, according to the course of the Common Law, as if it had been done upon the land.

It still, however, remains an offence by the Civil Law, and therefore a pardon of all felonies doth not discharge it; for, as it is a special offence, it ought to be specially mentioned. The method of trial in this offence is regulated by the 28th Hen. VIII.

CHAP. XI.

Of private Felonies against the Dwelling, &c.

PPRIVATE Felonies against the Dwelling or Habitation of a man, are of two kinds, 1. Burglary. 2. Arson.

SECT. I.

Of Burglary.

BURGLARY is a felony at Common Law; and it is described to be, where a person, by night, breaketh and entereth into the mansion of another, to the intent to commit some felony there, whether the felonious intent be executed or not.

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By the 18th *Eliz.* this offence is excluded clergy.

By the 5th and 6th *Edw. VI.* "to rob any body in a booth or tent, in a fair or market, the owner being within the same, is to be punished in like manner as Burglary, and without benefit of clergy, though without his, his children, or his servants notice or hearing."

By 3 and 4 *W. and M.* he that shall counsel, hire, or command any person to commit any Burglary, shall not have the benefit of clergy.

By the 12th *Ann.* "if any person shall enter the mansion-house, or dwelling-house, of another, by day or night, without breaking the same, with an intent to commit felony; or being in such house, shall commit any felony, and shall in the night-time break the said house to get out of the same, such person shall be taken to be guilty of Burglary, and shall not have the benefit of clergy."

A man

A man may lawfully kill a Burglar. *Bracton* saith, *Si quis furem nocturnum occiderit, ita deum impune facit, si parcere ei sine periculo non potuit, si autem potuit, aliter erit, in manibus enim regis sunt vita et mors hominum, sunt coram rege apud Windsore de quodam homine de coham, coram Gulielmo de Raruleigh tunc iusticiario, cui dominus rex in tali casu pardonavit mortem.*

Agreable hereto was the law of the Twelve Tables, *Si noctu furtum factum sit, jure caesus est.*

Likewise, as we have seen above, the *Athenian* and *Jewish* laws allowed of the killing a Burglar,

By a law of king *Ina*, Burglary was declared felony. In king *Edmund's* time, indeed the *Danes* made it fineable only; possibly from a consciousness of their own propensity to rapine and plundering. This privilege of the dwelling-house was anciently called *Hamsoka*, or *Hamsokne*.

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It is, without doubt, highly expedient, that this offence should be more severely punished than any other kind of Theft, since, besides the loss of property, the terror it occasions often proves of most fatal consequence; and it is observable, that the ancient laws above cited make a difference between a house-robbery in the night, and a robbery in the day.

There is good reason likewise why any one should be permitted to kill a Burglar; but where the Burglar has not been the occasion of death, by the dreadful alarm with which the Burglary is attended, it seems too severe to punish the offender capitally. For, though it should be lawful for a person to kill one whom he discovers in the attempt, since his designs may be as bloody as unjust, yet, after the fact committed, and no injury sustained besides loss of property, the offender may be condemned to make restitution, as in other cases of Theft, with this difference only, that his fine should be heavier, and his confinement longer.

S E C T.

S E C T. II.

Of Arsonry.

ARSON, or house burning, is a felony at Common Law, and is a malicious and voluntary burning the house of another by night or by day; or if one maliciously burns his own house, to the intent to burn others, if the intention is executed: but if only his own is burnt, it is not felony, but a great misdemeanour, punishable by fine, pillory, &c.

By the 23d *Hen. VIII.* for burning of houses or barns wherein any corn is, the principals and accessories are excluded clergy.

By the 43d *Eliz.* to burn, or cause to be burnt, wilfully or of malice, (or to aid, procure, or consent to the burning of) any barn, stack of grain, or corn, in the counties of *Northumberland, Cumberland, Westmoreland, or Durham*, is felony without clergy.

By

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By 22 and 23 *Car. II.* it is felony to burn any rick or stack of corn, hay or grain, barns, or other houses or buildings, or kilns, maliciously in the night-time; but the offender may make election to be transported for seven years: so that now it is felony to burn an empty barn in the night-time.

By the 1st *Geo. I.* if any person shall maliciously set on fire any wood, underwood or coppice, he shall suffer as a felon.

By the *Roman* law, they who were guilty of this crime were burnt to death, being wrapped up in a cloke, dawbed over with pitch, which was set on fire. Thus, when *Nero*, out of brutal curiosity, set fire to *Rome*, he contrived to lay the odium on the Christians, who were at that time generally disliked; and, seizing on all he could discover, he ordered them to be lighted up in this manner, to serve as tapers in the dark. To this custom, *Juvenal* alludes in the following verse,

Ausi quod liceat tunica punire molesta.

Martial

Martial likewise has an allusion to the same custom,

Nam cum dicatur tunica presente molesta.

This punishment, however, though chiefly appropriated to this crime, was inflicted on other very heinous offences.

By the *Scotch* law, *Arsony*, or, as they call it, *Fire-raising*, is declared treason by Stat. *James V.* parl. 3. c. 8.

By a law of king *Ina*, burning of woods was fineable; and we learn from ancient authorities, that in this kingdom one article of the Fire was, *de incendiariis nocturnis vel diurnis et combustionibus tempore pacis nequiter perpetratis.*

Bracton saith, *Si quis turbata seditione, incendium fecerit nequiter, et in feloniam, vel ob inimicitiam, vel alia de causa, capitali sententia punietur. Nequiter dico, quia incendia fortuita vel per negligentiam facta, et non mala conscientia, non sic puniuntur, quia civiliter agitur contra tales.*

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Britton saith, Soit inquis de ceux qui feloniously en tems de pace aient autres bles, au autres meason arses, et ceux que sur de ceo attain, soient arses, issent que ils soient punis per même le chose dont ils pachèrent. It appears from this passage in Britton, that he who feloniously set fire to another's corn or house was to be burnt, to the intent that he might suffer in the same manner he offended.

Fleta saith, Si quis ades alienas nequiter ob inimicitiam, vel prede causa, tempore pacis combusserit, et inde convictus fuerit per apellum, vel sine, capitali debet sententia puniri.

According to the *Mirroure*, *Ardours sont que ardent citie, ville, maison, homme, bete, ou autres cateux, de leur felonie, en temps de pace, pour fame au vengeance; and the Mirroure further says, that if a man is put into the fire, whereby he is burnt or hurt, it is a Capital Crime; but it is a sufficient plea that the mischief came by mischance, and was not premeditated.*

So

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So heinous was this offence, that in Anno 3 Edw. I. it was declared by parliament, *Que ceux que sont prises pour arson feloniously fait, ne soient en aucune maniere replevisable. Adjudicantur suspendi, qui ex malitia precogitata combusserunt magnam partem de Lynne in Com. Norf.*

The dispersing of bills threatening to burn houses, &c. was made High Treason by Hen. VI. but that act is repealed by 1 Edw. VI. chap. 12. and 1 Mar.

The offence of Arsonry ought undoubtedly to be most severely punished; and where death ensues in consequence of it, the punishment ought to be capital. But where no death ensues, and wherever by sparing the life of the delinquent reparation can be made, however slowly and imperfectly, it seems bad policy to execute the offender.

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There are other private felonies immediately hurtful to the subject, which are made capital by the Statute Law, and which are not properly reducible under the heads of felonies against the life, body, goods, or habitation.

These chiefly relate to Records, Cattle, Ships, Bankrupts, and Forgery. Stealing and defacing of Records is felony. Killing, &c. of Cattle is death. Destroying of Ships is capital. Bankrupts not surrendering themselves, or concealing their effects, are felons, without benefit of Clergy. Forgery, of which there are various kinds, is capital. By the Law of *Egypt*, Forgery of all sorts was punished by cutting off the offending parts; that is, both the hands.

CHAP.

CHAP. XII.

Reflections on the foregoing Heads.

FROM the above brief enumeration of Capital Offences, we may see in what a vast variety of instances Criminals may forfeit their lives. They are indeed so numerous, that the infrequency of executions is rather matter of surprize: but the necessity, if any there is, of putting offenders to death in such a number of cases, rather arises from an original defect in our Criminal Laws, than from the nature of the crimes themselves.

It does not appear that any of these Capital Offences, except some species of Treason, and also Murder and Mayhem, and, in some cases, Arsony, ought to be punished with such indiscriminate rigour.

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By punishing a petty Theft, above the value of twelve-pence, with the same severity as Murder, and other atrocious Crimes, the Laws do, in fact, break through the boundaries of Morality, and take away those distinctions which Reason and Nature suggest to every intelligent mind.

Cruelty in Punishment often renders offenders desperate; and makes them inhuman where they would otherwise be only unjust. Thus the Laws, which ought to soften the ferocity of obdurate minds, tend to corrupt and harden them.

It is universally allowed, that men's dispositions are, in a great measure, formed by education; and what education is to every individual, the Laws are to society.

Where the Laws are sanguinary, delinquents will be hard-hearted and barbarous. As the right of Punishment is now taken from private hands, and vested in the public Magistrate, why should the rigour

of

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of Punishments be increased? Though Crimes against the peace and safety of society should be exemplarily punished, yet the order and security of society does not require that the Laws should be sanguinary.

When the right of private revenge was first wrested from individuals, there was certainly more reason for the severity of Punishments, than now that mankind are grown more civilized.

When men had but newly resigned the privilege of revenging their own wrongs, it behoved the Magistrates to make Punishments very exemplary and severe; or, the offended party, in those days when revenge had its full scope, would have deemed them inadequate reparations of his wrongs.

Yet, in fact, they were then much milder than in these days of refinement. The reason of their lenity is very acutely traced by a very ingenious writer, already quoted. To induce individuals to part with their

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right of private revenge, the Magistrate wisely practised on their passions, and subdued the lesser, by gratifying the greater.

Avarice has at all times been the passion most universally prevalent, as it is indeed the means of indulging the rest. The Magistrate therefore inflicted large fines, which were paid by the delinquent to the injured party or his relations, by way of composition for the crime. Even murder, as has been shewn, was expiated by composition.

In process of time, however, as the idea of society began to ripen, these compositions were not paid wholly to the party injured, but part was applied to the Fisk, or Treasury, as an atonement for the offence committed against the public.

At length the idea of society grew strong, and the power of the Magistrate was so confirmed, that Crimes were punished as if they affected the community alone, and no

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reparation was provided for the injured. The order of government, or, to speak more freely, the interest of the governors, came to be the sole consideration.

This principle operates to this day, in Capital, and many other Offences. Criminals are executed, their lands and goods are forfeited, and the injured party is left without any other reparation than the blood, banishment, or imprisonment of the offender. Nay, more, the injury is aggravated by the expence of a prosecution.

The very form of our indictments seems, at first sight, to point out, that the offence against the State is the sole consideration in Law, since they conclude with alledging the Crime to be, "contrary to the peace of our Sovereign Lord the King, his crown and dignity, &c." but in truth the detriment done to the injured party, is the primary wrong: And the offence is said to be against the king's crown and dignity, because it is a dishonour to the king's government, that his

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subjects should not, while they live within the Law, enjoy peace and security: And surely it is no less dishonour to government, that the subjects when injured should remain without reparation.

Right Reason, in this, and in all other cases, avoids extremes, and delights in a medium; she directs us to steer between the simplicity of rude regulations, and the refinement of modern institutions.

Much, no doubt, is due to society; but the good of society is best promoted by a regard for individuals. Human wisdom must rise from individuals to the whole; whereas modern policy takes a contrary direction, and aggravates the wrong done to individuals, under pretence of avenging the public.

It may, indeed, in civil concerns, be necessary to restrain individuals from pursuits of private interest, which may be of detriment to the general welfare; but in criminal cases it can never be requisite, on the

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the principles of just policy, that an injured individual shall be still farther aggrieved, to aggrandize and enrich the State.

In civil concerns, the advantage of an individual may be opposite to the good of the whole; but in criminal matters, the benefit of the whole can only be promoted by an attention to the safety and prosperity of individuals.

By making the State the sole object of attention in the Punishment of Crimes and the forfeiture of property, in consequence of conviction, society actually suffers. In short, in modern policy the State and society are two distinct objects; and the latter is prejudiced to enrich the former.

Few people have such enlarged notions of public good, as to prejudice themselves for the sake of society, much less for the sake of the public Treasury, which is called the State.

Severe

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Severe Punishments, therefore, and forfeitures to the Fisk, have these ill effects; some, out of tenderness of disposition, are deterred from prosecuting offenders, from a persuasion that their Punishment will exceed the measure of their guilt; and many desist from prosecutions, because nothing but expence and trouble is to be their lot, as all the fruits arising from the conviction of the criminal, accrue to the State.

The real good of the State, however, requires not only that adequate Punishments be impartially inflicted on the offenders, but that the injured should obtain adequate and speedy reparation of their wrongs.

If the prosecutor remain without reparation, and the State, whether by forfeiture or fine, is the only immediate gainer, how can such a practice be justified upon the principles either of equity or policy?

Will

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Will men in general labour for the State, without some view to private emolument? Why then should we expect them to prosecute their injuries for the benefit of the State, while their private wrongs remain unredressed?

In short, as the State, in cases of felony, can only be said to be prejudiced in consequence of the injury done to the prosecutor, it seems reasonable that the forfeiture should, in the first place, be applied to make him satisfaction; and that an overplus, according to the heinousness of the Crime, be appropriated to the Fisk, as an atonement to the State, for the bad example shewn to society.

This provision would, in truth, be agreeable to the old rule we read of in the Laws of King Ina, *Pars multa regi vel civitati; pars ipsi qui vindicatur, vel propinquis suis.*

The adage, that "Honesty is the best Policy," as it is assuredly the best direction

tion in private life, so it is likewise most certainly the surest guide in public administration.

By attempting, in such instances, to make the right of the State independent of, and prior to, the claim of an injured individual, we in fact teach individuals to prefer their own private and distinct interests to that of the community.

Of Capital Offences by the Military Law.

After the foregoing reflections, it may not be improper to take notice of those particular species of Capital Offences created by the Military Law; which are Mutiny and Desertion, &c. The punishment of death for these Crimes, is a severity which exceeds that of most ancient Military nations.

Among the *Egyptians*, Mutiny and Desertion were punished only by degradation and discharge; the disgrace of which

which could never be wiped off but by some brave action.

By the Laws of *Athens*, they who maintained their post with courage were advanced, and others were degraded.

All who refused to go into the army, cowards, and runaways, were expelled the Forum, were not crowned, and could not go to the public temples. He who offended against this public Law, was put into bonds by the *Ενδεκα* (or Eleven) and carried before the *Heliaστæ*, who pronounced sentence against him, and inflicted a mulct, or corporal punishment upon him, as the nature of the Crime required; if he was fined, he was to be imprisoned till he paid the mulct or fine.

He who cast away his arms was declared *Ατιμος*, or infamous, as was any person quitting his ship during a war by sea, or refusing to go to the war when prest.

To counterbalance these punishments, many excellent rewards were instituted to encourage soldiers and sailors to behave gallantly.

All disabled and wounded soldiers were maintained by the public;—the parents and children of those who fell in battle, were taken care of. If parents were killed, their children were put to school at the public charge; and when come to maturity of age, were presented with a suit of armour. Every one was settled in his respective calling, and honoured with the first seats in all public places.

By the *Roman* Law, indeed, the punishment in these cases was somewhat more severe. They who abandoned their post in battle, who stole any thing out of the camp, who gave false evidence, who falsely pretended to have done some great exploit out of hopes of a reward, or who fought without the general's orders, who lost their weapons, &c. were bastinadoed with the *Fustes*, in the following manner:

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The convicted person being brought before the Tribune, was by him gently stricken over the shoulder with a staff. After this the criminal had liberty to run, but at the same time, the rest of the soldiers were permitted to kill him if they could: So that being pursued with swords, darts, and all manner of weapons on every side, he was presently dispatched.

If a great number had offended by running away from their colours, mutiny, or other general Crimes, the common way of proceeding to justice, was by *decimation*, or putting all the criminals names together in a shield or vessel, and drawing them out by lot, every tenth man being condemned to die without reprieve; generally in the manner above described. By this means, though all did not suffer punishment, yet all were terrified into obedience. In late Authors, we sometimes meet with *vicefimatio*, and *centesimatio*, which words require no explanation.

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The *Romans* had punishments likewise, which only effected the credit of the delinquents, by exposing them to public shame; such as, by degrading them from a higher station to a lower;—by giving them a quantity of barley instead of wheat;—ungirding them and taking away their belt; making them stand all supper-time, while the rest sat down;—with other such trivial marks of disgrace.

Besides these punishments, *A. Gellius* has recorded a very singular one, which was the bleeding the delinquent: He imagines that in ancient times, this was prescribed to the drowsy and sluggish soldiers, rather as a medicinal remedy, than a punishment; and that in after ages, it might have been applied in most other faults upon this consideration, that all those who did not observe the rules of discipline, were to be regarded as stupid or mad; and for persons in such condition, bleeding is generally deemed an efficacious remedy. This reason however is not very satisfactory; and the Critick *Muretus* has obliged

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obliged us with another, which is more sensible. He supposes the design of this custom to have been, that those mean-spirited wretches might lose that blood with shame and disgrace, which they were afraid to shed nobly and honourably in the service of their country.

With respect to the military rewards among the *Romans*, they are too numerous to be specified in this place. A particular enumeration of them is indeed foreign from the present design. The different species of crowns they distributed, their triumphs and ovations, &c. are well known to persons conversant in the *Roman* history; and were admirably calculated to inspire the soldiers with courage and patriotism.

But the severity of our military Laws, do not seem by any means adapted to answer the ends proposed.

It is in vain to think of obliging men to face instant death, by the terror of future

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apprehensions. Cowards will always fly the present danger, as it were by instinct, and will hope either to conceal their cowardice, or to elude the punishment due to it.

As to military rewards, we have none, properly so called, especially for the encouragement of the common men.

F I N I S.



